Supreme Court, U.S.
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In the
Supreme Court of the United States

ALGIMANTAS M. DAILIDE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the denaturalization ground, "illegally procured," applies only to the "order and certificate of naturalization" or whether the intent of the denaturalization statute authorizes a federal court to redetermine visa eligibility as its basis for finding illegally-procured citizenship.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Algimantas M. Dailide. Petitioner has no corporate affiliations.

Respondent

Respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Algimantas M. Dailide, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

This case involves two separate appeals. The latest circuit opinion, decided January 15, 2003, is reported at *United States of America v. Algimantas M. Dailide*, 316 F.3d 611 (6th Cir. 2003). (App. A, p. 1a) The district court's unreported Memorandum of Opinion and Order, decided June 21, 2001, denying petitioner's motions and ordering revocation of citizenship is reprinted. (App. B, p. 25a) The circuit's first opinion partially affirming summary judgment (App.C, p. 38a), decided September 5, 2000, is reported at 227 F.3d 985 (6th Cir. 2000); and the district court opinion granting summary judgment, decided January 29, 1997 (App. D, p. 107a), is reported at 953 F.Supp. 192 (N.D. Ohio, 1997)

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was decided and filed on January 15, 2003, and the court entered its final order denying a timely petition for rehearing and petition for rehearing en banc on April 17, 2003 (App. E, p. 124a).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the limits of federal jurisdiction in denaturalization under §1451(a) of the Immigration and Nationality Act of 1952, as amended (INA), 8 U.S.C. §1101 et seq.

The pertinent statutory and Constitutional provisions relevant to this petition are reprinted (App. F, p. 126a) and are as follows:

a. 8 U.S.C. § 1427

b. 8 U.S.C. § 1429

c. 8 U.S.C. § 1449

d. 8 U.S.C. § 1451(a)

e. Article I, § 8, cl. 4 of the United States Constitution

STATEMENT OF THE CASE

Algimantas M. Dailide was denaturalized in a summary judgment proceeding based on a federal court's redetermination of his visa eligibility and lawful admission to this country.

Jurisdiction in the district court was invoked under 28 U.S.C. §1345 (a civil action commenced by the United States) and 8 U.S.C. §1451(a) (revocation of citizenship).

A. Proceedings Below

The petitioner lawfully entered this country in 1950 under the Displaced Persons Act of 1948 (DPA) (62 Stat. 1009); and having been found in compliance with all naturalization laws, he was naturalized pursuant to order of the U.S. District Court in Cleveland on September 6, 1955. (See order of citizenship and certificate of naturalization, App. G, p. 129a)[1]

On December 7, 1994, the Government filed a six-count Complaint in the district court in Cleveland, seeking Dailide's denaturalization pursuant to 8 U.S.C. §1451(a) on the ground that his order of citizenship and certificate of naturalization were "illegally procured."

The Government moved for Summary Judgment on Counts I and IV of the Complaint; and on February 28, 1997, the district court granted the motion on both counts. (App. D, p. 107a)

On September 5, 2000, in a splintered decision the circuit affirmed summary judgment on Count I only, finding that the defendant persecuted civilians during the war, with two judges concurring for different reasons. The circuit denied affirmance on Count IV, the charge that he made a willful misrepresentation in the immigration proceedings, and the case was returned to the trial court. (App. C, pp. 69a and 95a)

Petitioner filed a number of motions addressing Count IV, including one requesting a trial on the unresolved count. On June 21, 2001, the district court denied the motions, found

[1] Naturalization authority was conferred on the Attorney General exclusively in 1990. See 8 U.S.C. § 1421(a) (amended).

that the Government was entitled to summary judgment as a mater of law on Count I, and issued its final order revoking citizenship. (App. B, p. 25a)

On January 15, 2003, the Sixth Circuit affirmed the trial court, now however creating a new method of denaturalization. (App. A, p. 1a)[2]

B. The Circuit Court's New Denaturalization Method

The denaturalization method in *Dailide* is based on a judicial redetermination of a consular officer's decision to grant an immigrant visa under the Displaced Persons Act of 1948. (App. A, p. 3a)

A review of §1451(a) shows that it authorizes the U.S. Attorney to bring a suit to revoke and set aside the "order [of citizenship] and certificate of naturalization" if it was: 1) illegally procured, or 2) procured because of a concealment of a material fact or 3) a willful misrepresentation. (App. E, p. 127a)

The circuit's new method looks through the naturalization order to the citizen's immigration and proceeds as follows: Dailide was not eligible for a visa because he persecuted civilians;[3] consequently, he was not a lawfully-admitted immigrant.[4] And since lawful admission is a citizenship requirement under 8 U.S.C. § 1427 (App. F, p. 126a), he was not in compliance with that statute and therefore

[2] Count IV remains unadjudicated. (App. A, p.3a-4a)

[3] Persecution was found, over objection, based on an affidavit given by a Government historian (App.D, pp. 115a, fn4 and 116a); Dailide disputed the facts in an affidavit and two depositions.

[4] The court below does not provide a statutory citation for this statement.

citizenship was "illegally procured." *Dailide* refers to this method as an "extended" legal theory. See App. A, p. 8a fn 2. (Note that a "misrepresentation" in the immigration proceeding is not an element under this method.)

Sustaining this new method means that the Government can at any time have a federal court re-examine a naturalized citizen's visa and immigration qualifications, irrespective of when or under what immigration law he entered. Further, this new method permits the Government to proceed against any naturalized citizen who may have no idea what kind of past behavior warrants a finding of visa ineligibility.[5]

REASONS FOR GRANTING THE WRIT

I

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Sixth Circuit's holding that §1451(a) provides federal jurisdiction to review and redetermine visa eligibility and lawful admission as its basis for finding "illegally procured" citizenship (App. A, p. 3a) has not been, but should be, reviewed and settled by the Supreme Court.

Kungys v. United States, 485 U.S. 759 (1988) is the case most directly on point. Pertinent to this issue, Kungys made

[5] In this case the Government presented no witness or contemporary standards as to "persecution" or visa and admission disqualification.

a misrepresentation in both his 1947 visa proceeding and 1954 naturalization proceeding. (p. 773) This Court found that the two denaturalization grounds – concealment and misrepresentation – do not pertain to the 1947 visa proceeding; rather, it makes clear that they apply only to the 1954 *naturalization* proceeding. *Kungys* states:

> . . . the 'concealment or misrepresentation' clause of § 1451(a) applies only where the '*order and certificate of naturalization* . . . were procured by concealment of a material fact or by willful misrepresentation.' (p. 773)

Kungys was definite in its holding; it states: "Procurement of other benefits, including visas, is not covered" under the denaturalization statute.[6] (p. 773)

While this Court's language in *Kungys* appears to address visa procurement under all three denaturalization grounds, the holding speaks to concealment and misrepresentation. The issue for this Court is whether the remaining denaturalization ground, "illegally procured," is confined also to procurement of the *order of citizenship and certificate of naturalization* under §1451(a) or whether the statute authorizes a federal court to review and redetermine visa eligibility as its basis for finding unlawful admission and an "illegally procured" citizenship order.[7]

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[6] The Constitution, Art 1, §8, cl. 4, gives Congress the exclusive authority to enact naturalization laws. (App. F, p. 128a)

[7] The *Kungys* Court at p. 774 (fn.8) commented on *Fedorenko v. United States*, 449 U.S. 490 (1981), restating its denaturalization method: "whether, under the statutes governing the issuance of visas in 1947 [his] misrepresentation or concealments at that time *rendered his visa invalid*, thus causing" unlawful residence resulting in "illegally procured" naturalization under § 1451. In *Dailide*,

Dailide holds that §1451 stretches "illegally procured" back to the 1950 visa proceeding; it states:

> . . . through § 1451, Congress has *expressly granted jurisdiction* to the federal judiciary to substitute its judgment for that of the INS. In order to determine if citizenship was 'illegally procured,' it is necessary for the federal judiciary to re-examine an alien's criminal past *to ascertain whether he was legally eligible for his visa* at the time he received it. (emphasis added) (App. A, p. 3a)

This statute makes no reference to jurisdiction authorizing a federal court "to substitute its judgment for that of the INS"; nevertheless, as to visa review, *Dailide* concludes that:

> . . . §1451 not only permits the federal judiciary to substitute its judgment but *requires* it. (App. A, p. 12a)

Dailide disregards *Kungys's* holding that procurement of visas is not covered under § 1451(a). *Kungys* analyzes the Government's position and states:

> . . . we are unpersuaded by the Government's argument that a misrepresentation in the visa proceeding 'procures' the naturalization because it obtains United States residence, which in turn is a

---

however, there is no finding of a misrepresentation in the visa proceeding (Count IV) and therefore *no visa invalidity*. Moreover, here the circuit holds that the finding of a material misrepresentation in the visa proceeding is unnecessary. See App. A, pp. 3a-4a. Consequently, in *Dailide* the Government was unable to proceed under *Fedorenko's* denaturalization method.

prerequisite to naturalization, see 8 U.S.C. § 1429. (p.773)

In *Dailide,* however, the circuit follows the same unpersuasive argument as to "illegally procured"; that is, Dailide's ineligibility in the visa proceeding procures naturalization because it obtains United States residence, which in turn is a prerequisite to naturalization.[8] *Kungys's* analysis shows the same flaw in *Dailide.*

In addition, *Kungys* provides a second basis for its holding. It cites 8 U.S.C. §1429 (p. 773), which makes clear the law that determines lawful admission in the naturalization proceeding. Section 1429 (App. F, p. 126a), in effect since 1952, mandates that the naturalization court determine "lawfully admitted . . . for permanent residence [the naturalization requirement under §1427] in accordance with all applicable provisions of this Act," the INA.[9] *Dailide*, on the other hand, ignores §1429 and redetermines lawful admission under the DPA, an immigration law.[10] (App. A, pp. 3a and 13a)

The decision below cannot be reconciled with *Kungys*. There is nothing peculiar about Dailide that would make him

[8] *Dailide* cites no immigration statute or regulation to support its statement that petitioner was "statutorily ineligible for a visa" or that visa ineligibility makes an immigrant who was permitted entry after INS inspection, not-lawfully admitted. (App. A, pp. 11a-12a)

[9] Section 1449 requires that the court find compliance with all applicable "*naturalization laws.*" (App. F, pp. 126a-127a) See Certificate of Naturalization (App. G, p. 129a)

[10] The applicable sections of the DPA expired in 1952 and were eliminated from the statutes without savings provision, three years before Dailide's citizenship order. See 50 U.S.C. App. §§1951-1965.

less entitled to the same legal analysis afforded by this Court to Kungys, nor could there be any reason why Dailide's citizenship should be denied the application and protection of §1429.

II

THE QUESTIONS ARE IMPORTANT

The far-reaching effect of this revocation method is an understatement, for now any federal court in a denaturalization proceeding can go back in time and re-examine a consular officer's decision to grant a visa and on that basis set aside the Executive decision to lawfully admit *a naturalized American citizen.*[11] The concurring words of Justice Rutledge in *Schneiderman v. United States*, 320 U.S. 118 (1943) underscore the significance of permitting a court this authority:

> Actually, though indirectly, the decision affects millions. If seventeen years after a federal court adjudged him entitled to be a citizen, that judgment can be nullified and he can be stripped of this most precious right, by nothing more than re-examination upon the merits of the very facts the judgment established, no naturalized person's citizenship can be secure . . . if it can be done for *Schneiderman*, it can be done for thousands or tens of thousands of others. (p.166)

[11] A consular officer has ultimate discretion in the granting or denying of a visa. See 8 U.S.C. §1104(a)(1).

Dailide, however, is significantly more aggravated because it has expanded the statutory text to authorize a "re-examination upon the merits" that establishes *immigration*.

The law with respect to immigration review in a federal court has followed an unbroken path in this Court for well over 100 years, from the early Chinese immigration cases of the late 1800's to *Fiallo v. Bell*, 430 U.S. 787 (1977), and numerous other cases. This Court has made clear:

> At the outset, it is important to underscore the limited scope of judicial inquiry into immigration legislation. This Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens. (*Fiallo*, p. 792; citations omitted)

And as recently as *INS v. Ventura*, 537 U.S. ___ (2002), this Court made clear again that the law entrusts the agency to make the eligibility decision.

Ironically, here the circuit's intrusion into the visa proceeding affirms that "Dailide complied with all administrative procedures . . ." (App. A, p. 11a)

III

THE DECISION OF THE COURT OF APPEALS HAS A NEGATIVE EFFECT ON ALL NATURALIZED CITIZENS.

The denaturalization method of having a federal court determine that a consular officer was wrong in granting a visa makes every citizen's naturalization open for further adjudication.

Justice Douglas's concurring opinion in *Schneiderman* addresses this same issue under a similar statute. He says:

> If the applicant answers all questions required of him, if there is no concealment or misrepresentation, the findings of attachment [lawfully admitted] cannot be set aside on the grounds of illegality in the proceedings under §15. (p. 164)

While *Dailide* finds compliance with all administrative procedures and no misrepresentation as to immigration, nevertheless it sets aside the citizenship order on the grounds of "illegality in the proceedings" because, in the words of Justice Douglas, "another judge would appraise the evidence differently." *Schneiderman*, p. 164. As for the defense of this case, now the citizen must convince the court, after fifty-three years, that he was statutorily eligible to receive a visa.

The concurring words of Justice Rutledge now become even more meaningful:

> If this is the law and the right the naturalized citizen acquires, his admission creates nothing more than citizenship in attenuated, if not suspended animation. He acquires but prima facie status, if that. (*Schneiderman*, p. 166)

If *Dailide* is the law, then a federal court can open and reappraise the visa eligibility and lawful admission of every naturalized citizen for any reason, at any time and revoke the order and certificate on that basis. The circuit's new denaturalization method takes Justice Rutledge's statement to the extreme.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 01-3820

[Filed January 15, 2003]

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALGIMANTAS DAILIDE,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland
No. 94-02499
Paul R. Matia, Chief District Judge

JUDGES:
Before BOGGS, SUHRHEINRICH, and CLAY, Circuit Judges.

OPINION

SUHRHEINRICH, Circuit Judge. Defendant-Appellant Algimantas Mykolas Dailide, a former member of the Lithuanian *Saugumas*, a police organization that aided the

Nazis in exterminating the Jewish population of Vilnius during World War II, appeals from the decision entered on June 21, 2001, in the United States District Court for the Northern District of Ohio, denying his collateral challenges to the court's order of January 29, 1997, which granted summary judgment revoking Dailide's citizenship and cancelling his certificate of naturalization. *United States v. Dailide*, 953 F. Supp. 192 (N.D. Ohio 1997) (Dailide I).

On appeal, Dailide raises four issues. First, he claims the federal courts lack jurisdiction to cancel his citizenship. He claims that 8 U.S.C. § 1451 only gives the federal judiciary the power to review certificates of naturalization to determine if they were "illegally procured," but does not give us the power to substitute our judgment for that of the original Immigration and Naturalization Service (INS) inspector. Furthermore, he claims that even if the courts do have jurisdiction under the Displaced Persons Act of 1948 (DPA), that act does not apply to him because it expired three years prior to his naturalization. He argues his case should have been examined under the Immigration and Naturalization Act of 1952 (INA) (the successor to the DPA), wherein he believes the courts' jurisdiction to revoke citizenship is limited to cases where the alien failed to follow correct procedural avenues.

Second, Dailide claims that the district court lacked a factual basis for its denaturalization order because, on appeal, this Court declined to address Count IV of the original complaint, which was an allegation that Dailide had made misrepresentations to the Army Counter Intelligence Corps (CIC) in obtaining his visa. *See United States v. Dailide*, 227 F.3d 385, 399 (6th Cir. 2000) (*Dailide II*) (Nelson, J.,

concurring) (indicating that although a majority of the panel held that Dailide's citizenship was "illegally procured," a majority did not agree that he had made misrepresentations). Dailide claims that without affirmance of this count, the denaturalization order is factually deficient because the Supreme Court has made misrepresentation a necessary prerequisite to a finding of "illegal procurement."

Third, he claims the district court abused its discretion in denying his motion for a new trial based on newly discovered evidence.

Finally, he argues that the revocation of his citizenship was in violation of the Equal Protection Clause of the Fifth Amendment to the Constitution because similarly situated Nazi persecutors would have been treated differently, and judged under the INA rather than the DPA, depending on when they entered the country.

We affirm the decision of the district court on all counts. First, through § 1451, Congress has expressly granted jurisdiction to the federal judiciary to substitute its judgment for that of the INS. In order to determine if citizenship was "illegally procured," it is necessary for the federal judiciary to re-examine an alien's criminal past to ascertain whether he was legally eligible for his visa at the time he received it. Furthermore, it is proper to apply the DPA to Dailide because it was in effect when he entered the country, even though it was abrogated before he was naturalized.

Second, a finding of misrepresentation is unnecessary for revocation of citizenship because § 1451 does not condition

denaturalization on misrepresentation if the certificate of naturalization was otherwise "illegally procured."

Third, the district court did not abuse its discretion in denying Dailide's motion for a new trial because the motion was untimely and his newly discovered evidence could have been discovered earlier through due diligence and would not have led to a different result.

Finally, Dailide's Equal Protection argument fails because Congress may distinguish among classes of aliens, and regardless, "former Nazi henchmen who entered the United States in 1950" is not a suspect class within the meaning of the Fifth Amendment.

I. Facts

Dailide was born in the independent nation of Lithuania in 1921. He lived in the capital, Vilnius, and was enrolled in forestry school when the Soviet Union swept through the Baltics, and annexed Lithuania in 1940. Subsequently, Dailide, as a nineteen year-old student, voiced his opposition to Josef Stalin and the Communist Party and was expelled from school.

The Soviets did not hold Lithuania long, for in the Summer of 1941, while Europe was in the midst of World War II, the Nazis invaded and the whole of the Baltics fell under their control. Aside from eliminating the Lithuanian government in August 1941, one of the Nazis' first acts in Lithuania was to reconstitute the *Saugumas*, the Lithuanian Security Police, which had been disbanded by the Soviets just prior to the Nazi invasion. The *Saugumas* was

recommissioned to aid the Nazis in controlling the local population by performing searches and investigations and making arrests.

Dailide became a *Saugumas* desk clerk soon after its re-establishment. Two months later, he became a *Saugumas* "police candidate." This promotion coincided with Aleksandris Lileikis becoming chief of the Vilnius *Saugumas*. *See United States v. Lileikis*, 929 F. Supp. 31, 32-36 (D.Mass. 1996) (reviewing the role that the *Saugumas* and *Lileikis* played in the extermination of Lithuanian Jews). Dailide was appointed to the *Komunistu-Zydu Sekcijas* (the "Communist-Jews Section").[1] This section is believed responsible for the investigation and monitoring of communists and Jews in the area. Subsequently, he was transferred to the Information Section, where he claims his duties included gathering background information on potential employees to ensure they were not communists. Later, around the end of 1942, Dailide received a field assignment.

The *Saugumas* played a significant role in helping the Nazis exterminate the Lithuanian Jews. The *Saugumas* was placed under the control of the *Einsatzkommando 3*, led by Nazi Colonel Karl Jager. Upon the Nazi invasion, the Vilnius Jews were arrested and herded into two ghettos. Many were sent to hard labor at Lukiski prison, then taken to Paneriai, a wooded area six miles away, and shot in groups of ten. By the end of 1941, 30,000 Vilnius Jews had been murdered. One

---

[1] In his brief, Dailide steadfastly refers to this section as the "Communist Section," though historians agree that it was called the "Communist-Jews Section." *See Lileikis*, 929 F. Supp. at 34.

ghetto was completely liquidated in 1941, and the other in 1943. By the end of the Nazi occupation in 1944, 55,000 Jews had been killed in Vilnius. Dailide claims he had no knowledge of any of these atrocities.

In 1944, as the tide of World War II was turning and the Allies were beginning to get a foothold in Nazi-occupied Europe, the Soviet Union marched into Lithuania and re-annexed the country. The Soviets held Lithuania as a Socialist Republic until its people gained independence on March 11, 1990. *See* Paul Quinn-Judge, *Lithuania Declares its Freedom from USSR*, Boston Globe, Mar. 12, 1990, at 1. Dailide, fearing repercussions from the Soviets, fled the Baltics in 1944, along with many other Nazi sympathizers. He established residence in Germany, where he met his wife, settled down, and lived until 1950.

In that year, he applied for emigration to the United States. Dailide's immigration process, like that of all aliens seeking entry in 1950, consisted of three steps. First, he had to qualify as a refugee with the International Refugee Organization (IRO). IRO Constitution, 62 Stat. 3037, 3051 (1948). Second, he had to receive a determination of displaced person status from the Displaced Persons Commission (DPC). Finally, he had to apply for and receive a visa from the United States Department of State. *Dailide II*, 227 F.3d at 401-02. Once lawfully admitted under a visa, he could apply for naturalization after five years.

There is no record of whether or when Dailide qualified as a refugee, but it is presumed he did. In order to receive displaced person status, Dailide was required to fill out a questionnaire from the CIC. The form inquired as to Dailide's

activities during the war, to which he responded he had been a "practitioner forester." Further, the form inquired as to whether Dailide had ever been a member of a police service, to which he answered "no." Based on his form, Dailide received displaced person status. Dailide subsequently received his visa, without problem, from the Department of State. In 1955, he was naturalized and became a citizen of the United States. Upon his entry, he moved to Ohio and was living in Brecksville, outside of Cleveland, as of 1994.

II. Procedural Background

Upon the collapse of the Soviet Union, *Saugumas* records finally became available to INS and Office of Special Investigations (OSI) agents in 1993. Although agents had been aware for years of the role the *Saugumas* played in the extermination of the Vilnius Jews, *see, e.g.*, *United States v. Kungys*, 571 F. Supp. 1104 (D. N.J. 1983), *rev'd.*, 793 F.2d 516 (3rd Cir. 1986), *rev'd.*, 485 U.S. 759, 99 L. Ed. 2d 839, 108 S. Ct. 1537 (1988), this was the first opportunity to learn of the composition of its membership. Agents discovered that Dailide was listed as a *Saugumas* member, and in July of that year, interviewed Dailide in Cleveland.

On December 7, 1994, the Government initiated proceedings to revoke Dailide's citizenship based on his membership in the *Saugumas* and related activities during the war. The Government filed a six-count complaint charging that Dailide had illegally procured his citizenship. The complaint sought revocation of his citizenship and cancellation of his certificate of naturalization.

The only relevant counts to this appeal are Counts I and IV. Count I charged Dailide with "assisting in persecution," in violation of the Constitution of the IRO, 62 Stat. 3037, 3051-52 (1948). Count IV charged Dailide with material misrepresentation, in violation of the DPA, 62 Stat. 1009, 1013 (1948), and of 8 U.S.C. § 1427.[2]

---

[2] Section 1427 is the naturalization statute under which Dailide was granted citizenship in 1955. It required that all aliens first be "lawfully admitted" into the country. In its definition of "lawfully admitted," the DPA incorporated the definition of "refugees and displaced persons" from the Constitution of the IRO. *See* § 2(b), 62 Stat. 1009. The IRO Constitution provided that the following persons would not be eligible for refugee or displaced persons status:

> 1. War criminals, quislings, and traitors.
>
> 2. Any other persons who can be shown:
>
> a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or
>
> b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.

Annex I, Part II, 62 Stat. 3051-3052. *See also Fedorenko v. United States*, 449 U.S. 490, 495 nn. 3-4, 66 L. Ed. 2d 686, 101 S. Ct. 737. Extended, the legal theory is that if an alien was never eligible for displaced person status, he was never "lawfully admitted" and his visa is invalid. He therefore "illegally procured" his citizenship, since no alien can be legally naturalized without a valid visa.

On January 29, 1997, the district court granted summary judgment for the Government on Counts I and IV, finding, in Count I, that the *Saugumas* had committed countless atrocities against the Jews, and that Dailide himself had persecuted Jews; and in Count IV, that Dailide made material misrepresentations when he lied to the CIC on his displaced person questionnaire, stating that he was a "practitioner forester" during the war, and that he had never been a member of a police force. *Dailide I*, 953 F. Supp. at 197-99.

Dailide appealed to this Court, and we affirmed the order of summary judgment on September 5, 2000. However, the Court only affirmed on Count I, holding no error in the district court's finding that Dailide persecuted the Jews of Vilnius. No majority of the Court affirmed the disposition of Count IV. Yet the result was affirmed, with a majority of the panel concluding that a finding of persecution was enough to indicate "illegal procurement" of Dailide's citizenship, and that revocation was proper. *See Dailide II*, 227 F.3d at 398-99 (Nelson, J., concurring).

Prior to June 8, 2001, Dailide filed seven post-trial motions in the district court, seeking collateral review. He claimed, *inter alia*, that the summary judgment order should be set aside and the case should be scheduled for trial. The Government moved for an order revoking Dailide's citizenship and directing the surrender of his certificate of naturalization.

The district court again granted summary judgment in favor of the Government on June 21, 2001, finding all of Dailide's claims either untimely or without merit. Furthermore, the court entered the order requested by the

Government revoking Dailide's citizenship and ordering the surrender of his citizenship papers.[3]

Dailide filed his notice of appeal to this Court on July 23, 2001, reiterating the same claims he brought before the district court. Dailide's appeal is timely under Fed. R. App. P. 4(a)(1)(B), and he is again before this Court.

III. Jurisdiction

Fed. R. Civ. P. 60(b)(4) permits a collateral motion challenging a court's subject matter jurisdiction, but only if such lack of subject matter jurisdiction makes the judgment "void." However, we have held that such an attack is only cognizable if brought within a reasonable time. *See Manohar v. Massillon Cmty. Hosp.*, 2000 U.S. App. LEXIS 4867, *No. 99-3481, 2000 WL 302776* at *1 (6th Cir. March 17, 2000). On occasion, we have held a period of five years since judgment as too long. *See id.* We have also once held a period of three years too long. *See Ohio Cas. Ins. Co. v. Pulliam*, 1999 U.S. App. LEXIS 14136, *No. 96-6522, 1999 WL 455336* at *3 (6th Cir. June 23, 1999). Here, it had been approximately four years between the time the district court entered summary judgment in January 1997 and the filing of Dailide's collateral motion in December 2000. Although his appeal was pending before this Court in the interim, and his collateral attack was filed within months of the disposition of that appeal, there is no rule that would have prevented Dailide

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[3] In the meantime, the INS held a deportation hearing in Florida (Dailide's subsequent residence) and has ordered him deported to Lithuania. *In the Matter of Dailide*, No. A07-412-330 (Imm. Ct., Bradenton, Fla., May 22, 2002).

from filing his collateral motion while his appeal was pending. *See McDowell v. Dynamics Corp. of Am.*, 931 F.2d 380, 383 (6th Cir. 1991). Accordingly, we find that Dailide had not brought his Rule 60(b)(4) motion within a reasonable time after disposition, and his prayer for relief is untimely.

But regardless of whether Dailide brought his collateral motion within a reasonable time, his attack lacks merit, under de novo review. *See Jalapeno Property Mgmt., LLC v. Dukas*, 265 F.3d 506, 515 (6th Cir. 2001).

Under § 1451, the judiciary's role is limited to revocation of citizenship only if that citizenship was "illegally procured." The language of 8 U.S.C. § 1427 makes "lawful admission" a statutory prerequisite to the acquisition of citizenship. *See Fedorenko v. United States*, 449 U.S. 490, 515, 66 L. Ed. 2d 686, 101 S. Ct. 737 (1981). The district court held that, although Dailide complied with all administrative procedures, he had never been "lawfully admitted" because he was statutorily ineligible to receive a visa in the first place under the DPA because of his Nazi past. However, Dailide claims that if an alien is granted citizenship through the legal framework set by the INS, citizenship was necessarily legally procured, regardless of whether he "slipped through the cracks" and should never have been admitted in the first instance. His argument equates to a belief that the courts cannot review an alien's record to determine if he was legally eligible for admittance at the time he received his visa, but can only look to ensure that the alien conformed to the correct administrative procedures. He maintains that it is within the sole jurisdiction of the Executive branch to re-examine an alien's record to determine whether he was eligible for a visa in the first instance. *See* 8 U.S.C. § 1103(a); *City of New*

York v. Baker, 278 U.S. App. D.C. 405, 878 F.2d 507, 512 (D.C. Cir. 1989) (indicating that the courts have no power to issue visas). In other words, he claims the court cannot substitute its judgment for that of the INS agent. So, in essence, Dailide's argument is that the district court unconstitutionally applied § 1451 and violated the separation of powers doctrine.

Dailide is correct that the courts only have power in regard to immigration as Congress allows. *See, e.g., Fiallo v. Bell*, 430 U.S. 787, 792, 52 L. Ed. 2d 50, 97 S. Ct. 1473 (1977); *see also Wong Wing v. United States*, 163 U.S. 228, 233, 41 L. Ed. 140, 16 S. Ct. 977 (1896). Dailide is also correct that, under statute, the federal judiciary is permitted only to make a determination of whether citizenship was "illegally procured." 8 U.S.C. § 1451. However, this determination necessarily requires an examination of the original visa process. Accordingly, § 1451 not only permits the federal judiciary to substitute its judgment, but *requires* it. When the consular officer or the INS was unaware of an alien's criminal past that predated his visa application, the judiciary is necessarily charged with reviewing the circumstances, and if the court finds that the alien was not legally entitled to a visa under the DPA when he received it, then the alien was never "lawfully admitted" under § 1427. Hence, citizenship was "illegally procured" under § 1451, and the court must substitute its judgment.

Dailide further challenges the federal courts' jurisdiction, maintaining that the DPA does not apply to him because it expired in 1952, three years before Dailide was naturalized. Dailide argues that if the DPA does not apply, reversal is mandated because it is the DPA's definition of "lawfully

admitted" that the district court relied on to determine that he had "illegally procured" his citizenship.

Dailide proposes that his case should be examined under the INA, which abrogated the DPA, and took effect in 1952. Under the INA, the definition of "lawfully admitted for permanent residence" was changed to include any and all persons who had been "lawfully accorded the privilege of residing permanently . . . as an immigrant in accordance with the immigration laws . . .." 8 U.S.C. § 1101(a)(20). Dailide reads this to mean that any person who received approval from the INS was "lawfully admitted," and therefore did not "illegally procure" his citizenship, regardless of any illegal acts the alien had performed in his homeland and failed to disclose to the INS.

Regardless of whether Dailide is correctly interpreting the INA as stripping the federal courts of jurisdiction to re-examine an alien's visa eligibility, he is wrong that the DPA does not apply to him. The DPA is applicable because it was the governing law in 1950, when Dailide arrived in the United States. The question of whether an alien was lawfully admitted is answered, not by the law at the time of naturalization, but by the law at the time of entry. *See Fedorenko*, 449 U.S. at 514-15 (referring to the statute "at the time of petitioner's initial entry into this country"); *see also United States v. Demjanjuk*, 518 F. Supp. 1362, 1386 (N.D. Ohio), *aff'd*, 680 F.2d 32 (6th Cir. 1982) (per curiam) (applying DPA to alien who had entered in 1952 and been naturalized in 1958).

Accordingly, Dailide's attack on the subject-matter jurisdiction of the federal judiciary to determine that his

citizenship was "illegally procured" because he had never been "lawfully admitted" was untimely and lacks merit. We therefore affirm the decision of the district court.[4]

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[4] Dailide's attorney made the same jurisdictional and factual sufficiency arguments in a similar collateral proceeding in the Seventh Circuit. *See United States v. Tittjung*, 235 F.3d 330 (7th Cir. 2000), *cert. denied*, 533 U.S. 931, 150 L. Ed 2d 721, 121 S. Ct. 2554 (2001). The Seventh Circuit held as we do today.

Subject matter jurisdiction can be challenged at any time. *But cf. Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n. 9, 72 L. Ed. 2d 492, 102 S. Ct. 2099 (1982) (stating that once a subject-matter jurisdiction claim is decided against a party, res judicata prevents him from re-litigating the issue). Dailide's failure to raise his meritless jurisdiction argument at his first appeal to this Court in 2000, though clearly cognizant of it as proved through his attorney's use of the defense in *Tittjung*, indicates to this Court that this present appeal was likely brought for the sole purpose of delaying Dailide's deportation until death. Moreover, the idea that Dailide's appeal is solely for delay purposes is furthered by the fact that three of his four arguments could have been brought in earlier proceedings, and are today untimely.

Dailide's attorney lost another similar denaturalization case, with an identical jurisdiction argument, in the Eighth Circuit. *See United States v. Negele*, 222 F.3d 443 (8th Cir. 2000), *cert. denied*, 531 U.S. 1153, 148 L. Ed. 2d 972, 121 S. Ct. 1100 (2001), but has yet to collaterally attack the judgment.

IV. Factual Sufficiency of the Order

Dailide next argues that the original summary judgment order cannot stand because no majority of this Court affirmed the finding of misrepresentation during his first appeal. Dailide claims that *Fedorenko* makes clear that a finding of misrepresentation is a necessary prerequisite to a finding that citizenship was "illegally procured."

In *Fedorenko*, the Supreme Court affirmed the revocation of a Ukranian death camp guard's citizenship. In doing so, the Court found that Fedorenko's citizenship had been illegally procured because he had never been "lawfully admitted" under § 1427 because his admission had been invalid under § 10 of the DPA, which declared that "any person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person" shall be inadmissible. 62 Stat. 1013; *Fedorenko*, 449 U.S. at 496. Specifically, Fedorenko denied his Ukranian heritage and claimed he was a farmer in Poland during the war.[5] *Id.*

However, *Fedorenko* is decided on its facts. The Court addressed Fedorenko's visa eligibility under § 10 of the DPA because his misrepresenations were the primary evidence that

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[5] Specifically, Fedorenko claimed, in response to a question, asking about his wartime activities (similar to that on Dailide's displaced person questionnaire), that he had spent that time as a farmer in Sarny, Poland. And then after being deported to Germany, he was forced to work in a factory in Poelitz until the end of the war, when he fled to Hamburg. *Fedorenko*, 449 U.S. at 496.

he had "illegally procured" his citizenship. The Court did not state, however, that it could not have affirmed the revocation under § 13, which makes "any person who is or has been a member of, or participated in, any movement which is or has been hostile to the United States or the form of government of the United States" visa ineligible, had the only evidence been Fedorenko's Nazi affiliation and persecution of Jews.[6] Accordingly, the Court could have reached the same result even if Fedorenko had filled out his form truthfully and obtained a visa, if it was later determined that he had participated in the atrocities of which he was accused.

Section 1451 makes no mention of a falsity requirement, but only requires an inquiry into whether citizenship was "illegally procured." Accordingly, through a plain reading of § 1451, coupled with the language in § 13 of the DPA making any Nazi ineligible for a visa, whether he lied on his application or not, we need not make a determination of whether Dailide made a material misrepresentation. Hence, a finding that Dailide was never "lawfully admitted" under the DPA because he had engaged in persecution is enough to allow us to find that his citizenship was "illegally procured."

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[6] Fedorenko served as a death camp guard at the Treblinka camp in Poland. However, as stated above, Fedorenko was not a German. He was a captured Soviet soldier forced to serve as a guard. He argued that his service at Treblinka was involuntary, and so, his activities there did not constitute "persecution" of the inmates there because he was forced to treat them cruelly. The Court rejected Fedorenko's argument and found that his conduct constituted "persecution" because he carried a gun and was permitted to leave the camp for short periods.

Accordingly, we affirm the decision of the district court that a finding of misrepresentation is not a necessary prerequisite to a finding of "illegal procurement."

V. Newly Discovered Evidence

Dailide next claims that the district court erred in denying his motion for a new trial based on newly discovered evidence. We review such denials under an abuse of discretion standard. *United States v. Ross*, 245 F.3d 577, 584-85 (6th Cir. 2001); *United States v. Gaitan-Acevedo*, 148 F.3d 577, 589 (6th Cir. 1998).

Whether a new trial is warranted in the face of newly discovered evidence is a four-part inquiry. First, the evidence must have been discovered after trial. Second, the evidence must not have been discoverable earlier through due diligence. Third, the evidence must be of the nature that might have led to a different result. Finally, the evidence must be material, not merely cumulative. *Good v. Ohio Edison Co.*, 149 F.3d 413, 423 (6th Cir. 1998).

However, after disposition, a defendant is not permitted to infinitely burden the court with motions referencing supposedly new exculpatory evidence. A defendant must bring any new evidence before the court within one year after disposition. *See Feathers v. Chevron, U.S.A., Inc.*, 141 F.3d 264, 269 (6th Cir. 1998). Here, Dailide filed his motion for a new trial more than four years after the January 1997 order of summary judgment. Accordingly, Dailide's motion for a new trial was untimely.

Even if timely, Dailide's evidence would not have warranted a new trial. Dailide claims as newly discovered evidence the report of Dr. Herbert Tiedemann, in which Dr. Tiedemann, a native German speaker, states that an earlier report, professed to be the work of Nazi Brigadefuhrer Dr. Walter Stahlecker, is a crude Soviet forgery.

In the original summary judgment order, and in our subsequent affirmance, the report of Dr. Stahlecker played a prominent role. *See Dailide II*, 227 F.3d at 392; *Dailide I*, 953 F. Supp. at 196 (indicating that the district court relied on the testimony of Dr. Yitzhak Arad, who has admitted that he had relied in part on the Stahlecker Report). The report was alleged to be the journal of the Brigadefuhrer, chronicling the march of the *Einsatzkommando 3* through the Baltics. It discussed the Nazis' capture and murder of many Jews. Most importantly here, it documented the camaraderie between the Nazis and the *Saugumas*, and illustrated how the *Saugumas* helped the Nazis exterminate the Jews of Vilnius.

Dr. Tiedemann concludes in his report that the Stahlecker Report is a fake. He points to the broken German used, indicating to him that the report was likely not written by a German or Austrian, but by a foreign forger, likely a Soviet.[7] Tiedemann further purports to illustrate that the writer of the Stahlecker Report was not familiar with the inner workings of the SS, since he often misapplies titles of officers, even misspelling the name of one of Stahlecker's commanding

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[7] He believes it was a Soviet because the alleged forger used Russian colloquialisms translated into German.

officers;[8] and supposedly displays an overall ignorance of the hierarchy. Furthermore, Tiedemann compares the Stahlecker Report with an earlier work of Stahlecker, demonstrating through sentence structure and vernacular that it is improbable that the two works were written by the same author. On its face, the Tiedemann Report is very thorough.

Notwithstanding, the Government's attorney asserted, at oral argument, that the Tiedemann report has itself been questioned by academicians. In many circles, Tiedemann is not highly regarded. Tiedemann is not merely the "German language expert" Dailide purports him to be. Tiedemann is a known historical revisionist, who has worked to discount the Holocaust as a hoax perpetrated by Jews to garner sympathy. Most notably, he has written claiming that the German massacre of Jews at a site called Babi Jar, near Kiev, Ukraine, was an elaborate lie perpetrated by Talmudic Jews. *See generally* Herbert Tiedemann, Babi Jar: Kritische Fragen und Anmerkungen, *in* Ernst Gauss, Grundlagen zur Zeitgeschichte (Grabert 1994). Such outrageous claims cast a shadow on any report written by Tiedemann concerning relations between Nazis and Jews during World War II. The questionable reliability of the Tiedemann Report further leads us to conclude that a new trial is not warranted because it is

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[8] Three grades above Stahlecker was Generaloberst Hoepner. The report refers to him as Hoppner. Tiedemann concludes that this is just one of many simple mistakes that the real Dr. Stahlecker would never have made. Furthermore, the writer of the report used territorial terms, such as "ostministerium" (department for the East), and military terms, such as "unterfuhrer" (lower leader), which Tiedemann claims were never used by the Nazis.

highly unlikely that the introduction of such a dubious account would have led to a different result for Dailide.

Dailide discovered this "evidence" after his original case was decided against him on summary judgment. While researching a similar revocation case, Dailide's counsel was presented with the idea that the Stahlecker Report may not be genuine. Accordingly, Dailide's counsel employed Dr. Frederick McGinness, a historian fluent in German, to review the document. McGinness found many linguistic mistakes inconsistent with the education and status that Stahlecker possessed. In turn, Dailide's counsel hired Dr. Tiedemann to examine the document.

However, through due diligence, Dailide's counsel could have discovered the report was questionable while researching Dailide's case. He could have easily employed the methods that he ultimately used. Furthermore, the Stahlecker Report is not a recently discovered artifact. It has been a prominent piece of evidence in previous trials of suspected *Saugumas* members. *See, e.g., Lileikis*, 929 F. Supp. at 33; *United States v. Ciurinskas* 976 F. Supp. 1167 (N.D. Ind. 1997); *United States v. Kungys*, 571 F. Supp. 1104 (D. N.J. 1983), *rev'd.*, 793 F.2d 516 (3rd Cir. 1986), *rev'd.*, 485 U.S. 759, 99 L. Ed. 2d 839, 108 S. Ct. 1537 (1988). Here, Dailide's counsel is arguing only that he did not think of the idea of discrediting the report earlier, not that he could not have discredited the report earlier. He was in possession of the report and easily could have hired the same or similarly

qualified experts to review and discredit it.[9] A new trial is therefore not warranted.

Moreover, even if the Stahlecker Report were discredited, there nonetheless exists an abundance of other evidence that inculpates the *Saugumas* as Nazi henchmen. The idea that the *Saugumas* was substantially responsible for the extermination of the Jews of Vilnius is not in serious historical doubt, with or without the Stahlecker report. *See, e.g.*, *Lileikis*, 929 F. Supp. at 32-35. Interviews of witnesses, survivors, and *Saugumas* officials have all corroborated the *Saugumas* connection to the Nazi atrocities. Moreover, there is physical evidence that the *Saugumas* was involved with the Nazis, such as the location of the *Saugumas* headquarters. *See, e.g.*, *Dailide I*, 953 F. Supp. at 197; *Lileikis*, 929 F. Supp. at 34-35.

Dailide offers a second piece of evidence, the book *Vilnius Ghetto: Lists of Prisoners*, as newly discovered. Dailide identifies fifteen names that appear on both a list of Jews arrested in 1941 and in the book, which lists Jews alive in 1942. Dailide presents this as evidence that Jews allegedly killed by the *Saugumas* in fact never died. However, the book existed in the public domain prior to the proceedings and could have been discovered earlier through due diligence. Moreover, the discovery of this evidence would not have likely led to a different result. First, the names on which Dailide relies are common Jewish names, not necessarily

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[9] Dr. McGinness is counsel's brother. Accordingly, it is likely that he was available to the defense to review the Stahlecker Report at an earlier time, had Dailide's counsel invited him to do so.

representative of the persons Dailide purports them to be. Second, even if the names do correspond to the same persons, Dailide has provided no evidence that these persons were not later executed, only that they were alive in 1942.

Accordingly, we find that the district court did not abuse its discretion when it granted summary judgment denying Dailide's motion for a new trial based on newly discovered evidence.

VI. Equal Protection

Finally, Dailide claims that he was denied Equal Protection under the Fifth Amendment. He alleges he was treated differently than a similarly situated alien who might have entered the country at a different time. Specifically, Dailide hypothesizes that a former *Saugumas* candidate who entered the United States after 1952 would not be subject to the same denaturalization criteria because of the different definitions of "lawfully entered" that appear in the DPA and the INA.

He argues that a *Saugumas* member who entered after 1952, under the INA, cannot be denaturalized if he had obtained a visa through proper procedures, whereas, under our holding, Dailide can be denaturalized, even though he obtained his visa through proper procedures, because of his Nazi past.

Again, we need not discuss whether Dailide's interpretation of the INA is correct. Our analysis of his Equal Protection claim does not change either way.

Courts have long recognized that Congress may discriminate between classes of aliens. As long as there is no suspect class involved, Congress may treat classes of individuals differently if there is a rational basis for such classification. *See Hamama v.* I.N.S., 78 F.3d 233, 237 (6th Cir. 1996). And Congress has sole discretion on admission, treatment, regulation, naturalization, and deportation of aliens. *See generally, Fiallo*, 430 U.S. 787, 52 L. Ed. 2d 50, 97 S. Ct. 1473. This power includes amending existing immigration laws to exclude groups of aliens, even if such group had previously been included, and this power is plenary. *See, e.g., Bartoszewska-Zajac v. I.N.S.*, 237 F.3d 710, 715 (6th Cir. 2001); *Newton v. I.N.S.*, 736 F.2d 336, 339 (6th Cir. 1984).

Dailide has not identified a suspect class to which he belongs. Although alienage is a suspect class, Dailide is not being treated differently than non-aliens. The DPA and the INA simply treat similar groups of aliens differently. However, Dailide is treated differently only because he is a former Nazi persecutor who entered the United States in 1950, as opposed to one who entered after 1952. There is no precedential basis, and no reason, for classifying this narrow group as a suspect class. *Cf. Linnas v. I.N.S.*, 790 F.2d 1024, 1032 (2d Cir. 1986) ("Nazi war criminals are not a class of persons entitled to enhanced scrutiny under the equal protection clause.").

Moreover, there is a rational basis for Congress's classification. We find it well within reason that Congress would want to limit the number of former Nazi cronies, who aided in persecuting and murdering over 6,000,000 people and who, for four years, waged war against the people of the

United States, living as citizens in this country. *See, e.g., Schellong v. I.N.S.*, 805 F.2d 655, 662 (7th Cir. 1986); *see also Linnas*, 790 F.2d at 1032.

Accordingly, we find that Dailide's Fifth Amendment Equal Protection claim lacks merit.

VII. Conclusion

For the foregoing reasons, we **AFFIRM** the order of summary judgment denying Dailide's collateral motions to the district court's previous order of summary judgment revoking his citizenship and cancelling his certificate of naturalization.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:94CV2499

[Filed June 21, 2001]

UNITED STATES OF AMERICA	)
Plaintiff	)
	)
v.	)
	)
ALGIMANTAS DAILIDE	)
Defendant	)
	)

MEMORANDUM OF OPINION AND ORDER

This action was brought pursuant to § 340(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1451 seeking to revoke Algimantas Dailide's citizenship and cancel the Certificate of Naturalization issued to him. On January 27, 1997, the Court entered summary judgment in favor of the plaintiff on counts I and IV of the complaint. In count I, the government alleged that Dailide was guilty of persecution of civilians in violation of § 2 of the Displaced Persons Act of 1948 (DPA) and in count IV it was alleged that Dialide made material misrepresentations during the immigration process which rendered him ineligible for admission to the United

States under § 10 of the DPA. The remaining four counts were dismissed without prejudice. The Court ruled that "it is clear that Dailide was not 'lawfully admitted' into the United States for purposes of naturalization under 8 U.S.C. § 1427(a) and that his citizenship and certificate of naturalization were 'illegally procured or were procured by concealment of a material act or by wilful misrepresentation' within the meaning of 8 U.S.C. § 1451(a)." *United States v. Dailide,* 953 F.Supp. 192, 199 (N.D. Ohio 1997). The Court's decision was affirmed by the Sixth Circuit Court of Appeals on September 8, 2000. *United States v. Dailide,* 227 F.3d 385 (6th Cir. 2000). The facts of the case were set forth in detail in these two cases and will not be repeated. Subsequently, Dailide filed the following seven post-trial motions: (1) motion to dismiss (Doc. 137); (2), (3) second motion to vacate summary judgment and motion to set case for trial (Doc. 138); (4) motion to dismiss complaint due to violation of defendant's right to equal protection under the United States Constitution (Doc. 143); (5) motion to stay government's motion to revoke citizenship and surrender certificate pending appeal (Doc. 144); and (6), (7) motions to vacate summary judgment and to set case for trial (Doc. 146). The government moved for an order revoking defendant's Certificate of Naturalization and directing its surrender. (Doc. 135). In addition to the briefs in support of the motions, the Court has considered opposing and reply briefs. (Docs. 139, 145, 147, 152, 156, 151, 155, 147, and 148). For the reasons that follow, Dailide's post-trial motions are denied. The government's motion for an order revoking Dailide's Certificate of Naturalization and directing its surrender is granted.

Dailide has brought his motions pursuant to Rules 12(b) (1), and (6) and Rule 60(b) of the Fed R. Civ. P. The following discussion applies to all of Dailide's motions.

There is no authority for a Rule 12(b) (6) motion to be filed after an action is no longer pending. *Eberhardt v. Integrated Design and Construction, Inc.*, 167 F.3d 861, 870-71 (4th Cir. 1999). Because Rule 12(h) (2) provides that a defense of failure to state a claim upon which relief can be granted may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at trial on the merits, it follows that the defense is waived after completion of the action on the merits. *Id.; Mann v. Hutchinson Public Schools,* 1999 WL 1092594 at *2 (10th Cir.). Dailide is precluded from filing his motions under Rule 12(b) (6).

The issue of the propriety of filing a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) was addressed by the Seventh Circuit in *United States v. Tittjung,* 235 F.3d 330, 334-35 (7th Cir. 2000), an action involving the revocation and cancellation of a Certificate of Naturalization. The court noted that a court may not decide a case without subject matter jurisdiction and the parties may not stipulate to the court's jurisdiction. If the subject is not raised by the parties, the court must decide the jurisdictional issue *sua sponte.* But when a party has had an opportunity to litigate subject matter jurisdiction, the issue may not be reopened in a collateral attack following an adverse judgment. *Id. citing Insurance Corp. of Ireland, Ltd v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 n.9 (1982).

Rule 60(b)(4) which allows relief from judgment if the judgment is void provides an exception to the rule precluding collateral attack on subject matter jurisdiction. *United States v. Tittjung,* 235 F.3d at 335. Rule 60(b) requires that motions under Rule 60(b)(4) be made within a reasonable time. The Sixth Circuit ruled in *Manohar v. Massillon Community Hospital,* 2000 WL 302776 at *1 (6th Cir.), that a 60(b)(4) motion filed 5 years after judgment was not filed within a reasonable time and 3 years was considered unreasonable in *Ohio Casualty Ins. Co. v. Pulliam,* 1999 WL 455336 at *3 (6th Cir.), *cert. denied,* 528 U.S. 1157 (2000). Dailide filed these motions 6 years after the case was filed. Summary judgment was entered over 4 years ago and, until recently, the action was pending in the court of appeals. The pending of the appeal does not prevent the filing of a Rule 60(b) motion, *McDowell v. Dynamics Corp. of America,* 931 F.2d 380, 383 (6th Cir. 1991), nor does it extend the time limit. *Hughley v. State of Tenn.,* 1994 WL 112870 at *2 (6th Cir.); *Culberson v. Doan,* 2000 WL 1946722 (S.D. Ohio) (when a party files a motion to vacate under Rule 60(b) while an appeal is pending from the judgment, the district court may indicate by written order that it is disposed to grant the relief and a remand may be sought from the court of appeals.) Dailide could have filed the Rule 60(b) motion even if the district court could not have ruled on it.

Dailide cannot prevail on this issue even if the Rule 60(b)(4) motion had been timely. Lack of subject matter jurisdiction will not always cause a judgment to be considered void. A judgment will be treated as void only when the jurisdictional error is egregious. In order to be egregious, an error "must involve a clear usurpation of judicial power,

where the court wrongfully extends its jurisdiction beyond the scope of its authority." *Id.*

This action has been pending since 1994. The complaint specifically alleged that the court had subject matter jurisdiction pursuant to 8 U.S.C. § 1451 and 28 U.S.C. § 1345. Dailide had an opportunity to argue this issue but instead admitted in his answer that the Court had jurisdiction. The Court cited 8 U.S.C. § 1451(a) as the basis for jurisdiction in its Memorandum of Opinion granting the plaintiff's motion for summary judgment. Furthermore, the Court's jurisdiction was not challenged in the court of appeals.

United States v. Tittjung and *United States v. Negele,* 222 F.3d 443 (8th Cir. 2000), *cert. denied,* 121 S.Ct. 1100 (2001), are similar to the present case. In fact, Dailide's counsel also represented both defendants. Many of the same issues were raised. The courts in both cases held that 8 U.S.C. § 1451(a) confers jurisdiction on federal courts to hear revocation of citizenship actions brought by the government. *United States v. Tittjung,* 235 F.3d at 336; *United States v. Negele* 222 F.3d at 446. In *Fedorenko v. United States,* 449 U.S. 490 (1981), a similar case, the United States Supreme Court held that 8 U.S.C. § 1451(a) provides a federal court with jurisdiction to make a determination of visa eligibility at the time of entrance to the United States and to revoke citizenship based on the finding of illegal visa.

A judgment can also be void under Rule 60(b) (4) if the court acted in a manner contrary to due process of law. *Antoine v. Atlas Turner, Inc.,* 66 F.3d 105, 108 (6th Cir.

1995); *Manohar v. Massillon Community Hospital,* 2000 Wl 302776 at *1. Dailide has not explained how the district court has deprived him of due process. He does however raise some issues that deserve discussion. First, he argues that federal court jurisdiction is an unconstitutional judicial encroachment into an exclusive executive function. The same argument was rejected in *United States v. Tittjung and United States v. Negele.* The Eighth Circuit found in *Negele* that the Constitution grants Congress the power to prescribe rules for securing naturalization. *See* United States Constitution Art. I, § 8 cl.4. When Congress delegates authority to the executive branch, the executive's activities may be reviewed by the judiciary to ensure that the executive acts within the scope of its authority. *Id. at 447. United States v. Tittjung,* 235 F.3d at 337-38.

Next, Dailide asserts that the Court lacked jurisdiction because the DPA did not exist when the district court entered Dailide's citizenship order in 1955. Dailide cites *Ex Parte McCardle,* 74 U.S. 506, 7 Wall 506 (1868), as his counsel did in the *Tittjung* case. In *McCardle,* the court determined that the passage of a bill repealing the portion of a statute that conferred appellate jurisdiction on the Supreme Court over habeas proceedings meant that the court no longer had jurisdiction to hear McCardle's appeal. In *Fedorenko,* the Supreme Court ruled that lawful admission is determined by the circumstances as they existed at the time of initial entry to the United States. *Id.* 449 U.S. at 514; *United States v. Tittjung,* at 339. 8 U.S.C. § 1427 under which Dailide was found to be unlawfully admitted to the United States, was in existence when he came here. Thus, this argument has no merit.

Dailide argues that he has been denied equal protection of the law because an individual, also a member of the Vilnius Saugumas, who entered the United States in 1955, as opposed to 1952 when Dailide arrived here, might not have been subject to denaturalization since the 1955 law did not have the same restrictions as the 1952 law. In *Turkhan v. Perryman,* 188 F.3d 814 (7th Cir. 1999), the court stated:

> Congress need not treat all aliens alike if there is a legitimate reason for treating them differently. As long as a statutory classification or distinction does not impinge on any fundamental right or target any suspect class, it will not be found to run afoul of the Equal Protection Clause provided that there is a rational basis for the classification.

Id. at 828, *citing Fiallo v. Bell,* 430 U.S. 787, 794-95 (1977). The Sixth Circuit has upheld statutory distinctions between classes of aliens if predicated on a rational basis. *Hamama v. I.N.S.,* 78 F.3d 233, 237 (6th Cir. 1996). Congress had a legitimate interest in ensuring that the United States would not be a haven for individuals who assisted the Nazis in the persecution and murder of millions of people. *Schellong v. I.N.S.,* 805 F.2d 655, 662 (7th Cir. 1986), *cert denied,* 481 U.S. 1004 (1987). Policy choices regarding categories of aliens to admit or exclude are matters more appropriate for the Legislature or Executive than the Judiciary. *Fiallo v. Bell,* 430 U.S. at 796. The court in *Harisiades v. Schaughnessy,* 342 U.S. 580 (1952) stated:

> The conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control.

Id. 342 U.S. at 596-97.

Dailide raises an equal protection argument in a second motion to dismiss. (Doc. 143). He contends that there is no uniformity in determining persecution: the same evidence in one court can produce a different result in another.

The law of the case doctrine precludes the Court from reopening issues decided at an earlier point in the litigation. *Craft v. United States,* 233 F.3d 358, 363 (6th Cir. 2000). Dailide contends that courts should use objective eligibility standards instead of a case-by-case evaluation to determine whether an individual assisted in persecution. This Court previously found that the assistance in persecution issue must be decided according to the facts of each case. *United States v. Dailide,* 953 F. Supp. At 196-97. The Sixth Circuit also determined that whether an individual's conduct could be considered as assisting the enemy must be determined on a case-by-case basis with reference to the relevant facts. *United States v. Dailide,* 227 F.3d at 391. Dailide has not established a violation of equal protection by the government. It appears

that he is complaining about the standard used by the Court which has also been utilized by the court of appeals.

Dailide's motions to vacate summary judgment and set case for trial (Doc. 146) and second motions to vacate summary judgment and set case for trial (Doc. 138) are based on newly discovered evidence and the contention that the government failed to provide exculpatory evidence. These motions are barred as being untimely. Rule 60(b) (2) provides relief from judgment because of newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 50(b). Thus, Rule 60(b) (4) applicable to void judgments does not apply. Further, Rule 60(b) requires that a motion for relief from judgment for the reason set forth in 60(b) (2) be filed not more than one year after the judgment. *See Feathers v. Chevron, U.S.A., Inc.*, 141 F.3d 264, 269 (6th Cir. 1998); *McFall v. Patton*, 2000 WL 1721043 at 1 (6th Cir.). The one year limitation period is not tolled during an appeal. *Jones v. Gundy*, 100 F. Supp.2d 485, 489 (W.D. Mich. 2000). Rule 60(b) (6) allows relief from judgment for any other reason but is not applicable if one of the first five numbered clauses of Rule 60(b) fits the circumstances of the case. *Hopper v. Euclid Manor Nursing Home*, 867 F.2d 291, 294 (6th cir. 1989); *Harris v. State of Ohio*, 1998 WL 939836 at *1 (6th Cir.). These motions were filed almost four years after the Court entered summary judgment. Thus, these motions are untimely.

Even if the Court were to consider these motions, Dailide cannot prevail. In order to succeed on a Rule 60(b) (2) motion, the movant must show that he exercised due diligence

in obtaining the information and that the evidence is material, controlling, and would have produced a different result. *Good v. Ohio Edison Co.*, 149 F.3d 413, 423 (6th Cir. 1998).

The newly discovered evidence on which the Rule 60(b) (2) motions are based consists of a written report of Dr. Herbert Tiedeman and a book entitled "Vilnius Ghetto: Lists of Prisoners." Dailide contends that Dr. Tiedeman's report can rebut two of the government's reports. These reports were provided to Dailide during discovery on January 25, 1996 and again as exhibits to the motion for summary judgment on July 26, 1996. In order to preclude summary judgment, Dailide should have examined those reports and found evidence to rebut them at that time. His argument that he was unaware of their deficiencies until they were shown to an expert in connection with another case has no merit as the expert was counsel's brother who could have been shown these reports earlier.

The "Vilnius Ghetto" book was published in 1996 and was available in the public domain for almost four years but was not brought to the Court's attention until appellate options were foreclosed. Since Dailide cannot show due diligence in presenting new evidence, he cannot prevail on the Rule 60(b) (2) motions even if they were to be considered timely filed.

Finally, Dailide argues that the government withheld exculpatory evidence because it possessed copies of "Vilnius Ghetto: List of Prisoners" and or the underlying list. The government explains that the information contained in the book or on the list is not exculpatory. The book contains a list

of prisoners claimed to have been in the Vilnius ghetto in May 1942. Dailide identified fifteen individuals whose names appear on a November 5, 1941 "List of [38] Jews Arrested by the Lithuanian Security Police" and whose names are printed in the book. Dailide contends that if these fifteen individuals were still alive in May 1942, he could not have assisted in their persecution in November 1941.

As the government points out, even if a name on the 1941 list is the same as on the 1942 list, it is not necessarily the same individual, e.g. "Abram Gordon" is a common Jewish name. Also, it is inconsequential whether some of the Jews arrested by Dailide in November 1941 were immediately murdered or returned to the ghetto until May 1942 or later only to be sent back to a concentration camp and executed at a later time. In either case, Dailide's participation in their arrest assisted in their persecution. Proof of their deaths is not necessary. The book does not dispute the admissions of Dailide nor the authenticated wartime documents which establish that Dailide took into custody Jews that attempted to escape persecution from the Nazis.

Accordingly, for the foregoing reasons, Dailide's motion to dismiss (Doc. 137), second motion to vacate summary judgment and set case for trial (Doc. 138), motion to dismiss complaint due to violation of defendant's right to equal protection under the United States Constitution (Doc. 143), motion to stay government's motion to revoke citizenship and surrender certificate pending appeal (Doc. 144), and motion to vacate summary judgment and set case for trial (Doc. 146) are denied.

The governments motion for an order revoking defendant's certificate of Naturalization and directing its surrender is granted. It is hereby ordered that Dailide's Certificate of Naturalization, No. 7523761, is hereby cancelled, and the September 6, 1955, Order of the United States District Court for the Northern District of Ohio admitting Dailide to United States citizenship and issuing said Certificate of Naturalization to him is revoked and set aside;

Dailide is forever restrained and enjoined from claiming any rights, privileges, or advantages under any document evidencing United States citizenship;

Dailide shall surrender and deliver to the Attorney General of the United States (or his designee) within ten days of the date of this Order, his Certificate of Naturalization, No. 7523761, and any U.S. passport or other documentary evidence of United States citizenship he may have.

IT IS SO ORDERED.

/s/_____
JUDGE PAUL R. MATIA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum of Opinion and Order was sent by regular United States mail to William Henry Kenety, Esq. and Jeffrey L. Menkin, Esq., Senior

Trial Attorneys, U.S. Department of Justice, Criminal Division, Office of Special Investigations, 1301 New York Avenue, N.W,. Suite 200, Washington D.C. 20530; Michael Anne Johnson, Esq., Assistant U.S. Attorney, 1800 Bank One Center, 600 Superior Avenue, East, Cleveland, Ohio 44114; and to Joseph T. McGinness, Esq., P.O. Box 221031, 23811 Chagrin Blvd., Ste. 36, Cleveland, Ohio 44122.

/s/_____
JUDGE PAUL R. MATIA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 97-3340

[Filed September 5, 2000]

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
)
v.)
)
ALGIMANTAS DAILIDE,)
Defendant-Appellant.)
)

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland
No. 94-02499
Paul R. Matia, Chief District Judge

JUDGES:
Before: NELSON, BOGGS, and CLAY, Circuit Judges.

OPINION

CLAY, Circuit Judge. Defendant Algimantas Dailide appeals from the district court's order granting partial summary judgment to the United States, on Counts I and IV of the government's six-count complaint brought pursuant to

§ 340(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1451, seeking to revoke Dailide's citizenship and cancel the Certificate of Naturalization issued to him, while dismissing the remaining counts without prejudice. In Count I of the complaint, the government alleged that Dailide was guilty of the persecution of civilians in violation of § 2(b) of the Displaced Persons Act of 1948 ("DPA"); and, in Count IV of the complaint, the government alleged that Dailide made material misrepresentations during the immigration process which rendered him ineligible for admission to the United States under § 10 of the DPA. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

I.

Dailide was born on March 12, 1921, in Kaunas, Lithuania. On June 22, 1941, Nazi Germany invaded Lithuania, along with its capital, Vilnius, and reestablished a police force known as the *Saugumas* that had existed under the Soviet occupation of Lithuania but had disbanded prior to the German invasion. Dailide voluntarily joined the *Saugumas* in 1941, and served until 1944, when the *Saugumas* dissolved along with the Nazi regime. According to Dailide, he was first hired as a *Saugumas* clerk in late June of 1941, and about six months later was then made a *Saugumas* police candidate. During this time, the infamous Aleksandras Lileikis became Chief of the Vilnius *Saugumas*.[1] Also during this period,

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[1] *See United States v. Lileikis*, 929 F. Supp. 31 (D. Mass. 1996) (granting the government's motion for summary judgment which claimed Lileikis' actions during German Nazi occupation of Lithuania as Chief of the Vilnius *Saugumas* required revocation of his citizenship).

Dailide claims that he worked in the Communist Section[2] of the *Saugumas* for approximately two weeks, and then was transferred to the Information Section of the *Saugumas*, where he gathered background information on prospective employees, including their nationality and citizenship. Thereafter, around the end of 1942 or early 1943, Dailide contends that he was given a field assignment, at which time he was issued a firearm which he claims he carried but never used.

The record details the role the *Saugumas* played during the Nazi occupation of Lithuania as follows:

> During the first days, apart from the formation of the partisan auxiliary squad, a Lithuanian Security Police and Criminal Police force was created. . . . The Lithuanian Security and Criminal Police operates according to the orders and guidelines provided to them by *Einsatzkommando 3* and its activities are under constant surveillance [*kontrolliert*] and, as much as possible, they are used for security police work which cannot be performed by the

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[2] According to Dailide, the purpose of the Communist Section was to gather information on persons thought to be Communist and who would likely overthrow the government. The government contends, however, that this section is properly referred to as the Communist-Jew Section. The government asserts that this section was responsible for, among other things, apprehending and interrogating Jews and those who assisted them. For the purposes of this appeal, the name of this section is immaterial.

> SD's own personnel, particularly searches, arrests, and investigations. . . .

(J.A. at 501-02.) The *Einsatzkommando 3* was a subunit of four mobile killing units responsible for the destruction of Jews in the Nazi-occupied areas of the Soviet Union. The *Einsatzkommando 3*, commanded by SS Colonel Jaeger, was specifically responsible for the execution of all Jews in the Vilnius region. The killing of the Vilnius Jews was conducted in three stages: 1) the Jews were arrested and transferred to Vilnius' Lukiskes Hard Labor Prison where they were kept in open cells; 2) the Jews were marched or driven from Lukiskes Prison to Paneriai, a wooded site about six miles outside Vilnius; and 3) the Jews were shot and killed in groups. The record indicates that SS Colonel Jaeger reported to SS General Stahlecker that the *Einsatzkommando 3* accomplished its goal of eliminating Jews from Lithuania:

> Today I can ascertain that the goal of solving the Jewish problem for Lithuania has been attained by *Einsatzkommando 3*. There are no Jews in Lithuania anymore, apart from work Jews, including their families. . . . I wanted to finish off these work Jews and their families as well but that brought me a sharp challenge from the Civilian Administration (the Reich Commissar) and the Wehrmacht [Armed Forces] and brought about this prohibition: These Jews and their families may not be shot!

(J.A. at 485.)

Dailide denies knowing that a relationship existed between the *Saugumas* and the German Police or military authorities. He also denies having any personal knowledge that Jews were shot at Paneriai, although he admits to having heard such a "rumor." However, according to the Government's expert historian, Dr. Yitzhak Arad, who has testified in similar denaturalization proceedings, by the end of 1941, approximately 30,000 Vilnius Jewish civilians had been killed by the *Saugumas*. Dr. Arad, who relied on records from the Lithuanian Central State Archives in Vilnius, on records from his own files, and on records held by the United States National Archives, stated in his affidavit that Vilnius killings were conducted in the three-step process described above, and, although the Jews arrested by the *Saugumas* were nearly always shot and killed, those Jews who were not initially killed were confined to one of two ghettos. According to Dr. Arad, ghetto conditions were wretched, in that the overcrowded conditions led to lice, filth, and disease; food and firewood were scarce; electrical appliances were banned; the exits of the ghettos were sealed by barbed-wire obstructions, and the doors and windows that faced the streets were barricaded; telephone and postal communications were forbidden; and Jews attempting to smuggle food into the ghetto were shot. The ghettos were liquidated in 1941 and in 1943, respectively, with a total of approximately 55,000 Vilnius Jewish civilians killed.

Dailide left Lithuania in 1944, and fled to Germany as a refugee. Dailide remained in Germany until 1949, and eventually entered the United States in 1950 as a non-quota immigrant under a DPA visa. In order to ultimately obtain his DPA visa, Dailide had to undergo a three-step process. First, he had to qualify as a refugee within "the concern" of the

International Refugee Organization ("IRO"); second, he had to receive a determination of displaced-person status by the Displaced Persons Commission ("DPC"); and third, Dailide had to qualify for and receive a visa from the United States Department of State.

After apparently qualifying as a refugee under the IRO, Dailide completed a personal history form prepared by the United States Army's Counter Intelligence Corps. ("CIC"), an organization which conducted investigations and interviews of applicants on behalf of the DPC. The personal history form asked Dailide for the "exact description" of his activities during the war. Dailide stated that during 1942-44 he was employed as a "practitioner forester" in Vilnius, Lithuania. Moreover, the form asked whether the applicant had been involved in any police service membership, to which Dailide responded, "No." Dailide claims to have concealed his membership in the *Saugumas* for fear of repatriation to the Soviet Union. Dailide eventually received displaced-person status, was granted a DPA visa, and entered the United States on February 19, 1950. Dailide then applied for naturalization on February 3, 1955, which was granted by order of the United States District Court for the Northern District of Ohio on September 6, 1955. Dailide currently resides in Brecksville, Ohio.

In July of 1993, after *Saugumas* records became available to outside investigators, Immigration and Naturalization Service ("INS") agents and the Office of Special Investigations ("OSI") personnel interrogated Dailide at his office in Cleveland regarding his role in the *Saugumas*. Thereafter, on December 7, 1994, the Government filed a six-count complaint seeking to revoke Dailide's citizenship

and cancel his certificate of naturalization pursuant to § 340(a) of the Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. § 1451(a). The government sought summary judgment on Count I, which alleged that Dailide was guilty of assisting the enemy in persecuting civil populations in violation of § 2(b) of the DPA, and on Count IV, which contended that Dailide made material misrepresentations during the critical stage of the immigration process in violation of § 10 of the DPA. The district court granted the government's motion for summary judgment on these two counts on January 29, 1997, and on February 28, 1997, the district court entered an amended order granting the government's motion, and dismissing the remaining counts without prejudice. *See United States v. Dailide*, 953 F. Supp. 192 (N.D. Ohio 1997). Dailide then filed a timely notice of appeal.

II.

Standard of Review -- Summary Judgment & Denaturalization Proceedings

This Court reviews a district court's order granting summary judgment *de novo*. *Equitable Life Assur. Soc'y v. Poe*, 143 F.3d 1013, 1015 (6th Cir. 1998). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. The moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-moving party's case. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989) (citing *Celotex Corp. v.*

Catrett, 477 U.S. 317; 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). An issue of fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Determination of whether a fact is "genuine" requires consideration of the applicable evidentiary standard. *Id.* A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Id.* Once the moving party satisfies its burden, "the burden shifts to the nonmoving party to set forth specific facts showing a triable issue." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574; 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

In denaturalization proceedings the government carries a heavy burden of proof. *Fedorenko v. United States*, 449 U.S. 490, 505, 66 L. Ed. 2d 686, 101 S. Ct. 737 (1981). The evidence justifying revocation of citizenship must be "clear, unequivocal, and convincing" and not leave the issue in doubt. *Id.* However, the defendant bears an equally heavy burden in establishing that he strictly complied with all the congressionally imposed prerequisites to the acquisition of citizenship, because his failure to comply with any of these conditions renders the certificate of citizenship "illegally procured," and naturalization that is unlawfully procured can be set aside. *Id.* at 506.

As noted by the district court, although the government bears a heavy burden in denaturalization proceedings, the facts of a case may be such that revocation of citizenship at the summary judgment stage may be appropriate. *See, e.g., United States v. Koreh*, 59 F.3d 431 (3rd Cir. 1995); *United States v. Lileikis*, 929 F. Supp. 31 (D. Mass. 1996); *United*

States v. Leprich, 666 F. Supp. 967 (E.D. Mich. 1987). Those supportive of Dailide may attempt to distinguish these cases by arguing that the acts of the defendants therein were somehow more egregious than those of Dailide. We are unpersuaded by such an argument where the *degree* of persecution is not at issue. Rather, the issue is whether Dailide engaged in such persecution and, specifically, at the summary judgment stage, whether a genuine issue of material fact remained for trial as to his participation in the persecution. Indeed, under the facts of this case, we find the evidence that Dailide assisted the enemy in persecuting civil populations and willfully misrepresented material facts for purposes of gaining admission to the United States to be so "clear, unequivocal, and convincing," that no stronger or more obvious a case exists for summary judgment.

Apologists for Dailide may also argue that summary judgment was not appropriate because it has been said that, "where the fate of a human being is at stake, we must not leave the presence of his evil purpose to conjecture." *Knauer v. United States*, 328 U.S. 654, 659, 90 L. Ed. 1500, 66 S. Ct. 1304 (1946). However, under the facts of this case, to find that the presence of Dailide's evil purpose was mere conjecture would be a travesty of justice and make a mockery of the process by which traditional denaturalization proceedings should occur. To deny the government's motion here would do nothing more than protect one who clearly, as a matter of law, failed to comply with all the congressionally

imposed prerequisites to the acquisition of citizenship.[3] *Fedorenko*, 449 U.S. at 505.

III.

Congressional Prerequisites for Citizenship & Basis for Denaturalization

Pursuant to § 1451(a), citizenship may be revoked and the certificate of naturalization may be canceled if both were "illegally procured or were procured by concealment of a material fact or by willful misrepresentation." 8 U.S.C. § 1451(a) (1994). One of the requirements to "legally" obtain a naturalization order and certificate is that the applicant was "lawfully admitted for permanent residence." 8 U.S.C. § 1427(a)(1) (1994). Lawful admission for permanent residence, in turn, requires that the applicant enter the United States pursuant to a valid immigrant visa. *Fedorenko*, 449 U.S. at 515.

Therefore, entry into the United States under an invalid visa is a failure to comply with congressionally imposed

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[3] We note at this juncture that we take issue with the dissent's claim that the government bears a "heavier" burden at the summary judgment stage of a denaturalization case. The government's burden of proof at a denaturalization proceeding does not change; it must show by "clear, unequivocal, and convincing" evidence that revocation of citizenship is justified. *Fedorenko v. United States*, 449 U.S. 490, 505, 66 L. Ed. 2d 686, 101 S. Ct. 737 (1981). To succeed at the summary judgment stage, the government must simply show that it has met this burden as a matter of law.

statutory prerequisites to citizenship which renders any certificate of citizenship revocable as illegally procured under § 1451(a). The government contends that Dailide unlawfully obtained admittance to the United States because he did not obtain a valid visa inasmuch as he (1) assisted the enemy in the persecution of civil populations, and (2) willfully misrepresented material facts for purposes of gaining admission to the country.

IV.

Whether Dailide Assisted the Enemy in the Persecution of Civil Populations

As stated, Dailide entered this country in 1950 as a non-quota immigrant under a DPA visa. In order to have qualified as an eligible displaced person for purposes of emigration into the United States under the DPA, the applicant must have been a "displaced person" as defined in the DPA. Pursuant to § 2(b) of the DPA, "'Displaced Person' means any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization [IRO] and who is the concern of the International Refugee Organization." In turn, the IRO sets forth a number of groups who are *not* "of concern" to the IRO, and include persons "who can be shown to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations." IRO Manual, Annex I, Part II, § 16 (2)(a). Accordingly, if the government is able show that Dailide assisted in the persecution of

civilians, it would succeed in its claim that Dailide was not eligible for a DPA visa at the time he entered this country.[4]

The *Fedorenko* Court emphasized that the proper focus in ascertaining whether one "assisted in persecution" should be on conduct of the individual, noting that mere membership in an enemy group was not sufficient to constitute assistance in persecution. 449 U.S. at 513-14 n.34. By way of example, the Court noted as follows:

> An individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians.

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[4] Dailide argues that there is no evidence that the Lithuanian civilians allegedly persecuted by the Vilnius *Saugumas* were of "countries, Members of the United Nations." This argument was not addressed by the district court; however, the record indicates that the Soviets incorporated Lithuania into the U.S.S.R. in the summer of 1940. (J.A. at 662.) Therefore, it is clear that Lithuania was a member of the United Nations.

Id. However one's conduct, even if involuntary, may rise to the level of assisting the enemy in persecution, *id.*; "there need be no personal participation by the defendant in the commission of physical atrocities." *Koreh*, 59 F.3d at 442.

In short, the determination of whether a defendant's individual conduct could be considered as assisting the enemy in this regard must be determined on a case-by-case basis with reference to the relevant facts. *Fedorenko*, 449 U.S. at 513-14 n.34; *Koreh*, 59 F.3d at 439. Whether Dailide's individual conduct rose to the level of assisting the Nazi regime in persecuting Jews as a matter of law requires a two-step inquiry. First, we must determine whether a genuine issue of material fact remains for trial as to whether the *Saugumas* persecuted civil populations; and second, whether a genuine issue exists as to whether Dailide assisted the *Saugumas* in the persecution.

1. Role of the *Saugumas*

The government presented documents that revealed the role the *Saugumas* played in assisting the Nazi regime in persecuting Jews. Specifically, the government produced the Stahlecker Report which detailed the role the Lithuanian Security Police and Criminal Police played during the Nazi occupation of Lithuania. *See supra* discussion Part I. The Stahlecker Report stated that the *Saugumas* were used to assist *Einsatzkommando 3*, particularly with searches, arrests, and investigations.[5] The *Saugumas* apparently carried out their

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[5] As stated previously, the *Einsatzkommando 3* was primarily concerned with the execution of all Jews in Lithuania. *See*

operations satisfactorily, receiving praise from SS General Stahlecker. The General noted in his report that "after the removal of the accused and unfit personnel and under the constant surveillance [*kontrolliert*] of *Einsatzkommando 3*, the Lithuanian Security and Criminal Police produced entirely satisfactory work . . . ."

Dailide argues that the government's translation of the Stahlecker Report changes the German word *kontrolliert* to "control" instead of Dailide's preferred translation "surveillance." However, viewing the translation as meaning "constant surveillance" as opposed to "constant control" the Stahlecker Report still shows that the Germans created, staffed, and directed the *Saugumas*.

Moreover, Dr. Arad stated in both his affidavit and deposition that Jews who were arrested by the *Saugumas* were almost always shot at Paneriai. Dr. Arad gave accounts of some of the atrocities committed by the *Saugumas*. For example, Dr. Arad stated that the *Saugumas* arrested two Jews, Saulius Varsaskis and Jenta Rachmaniene, for escaping from the ghetto, and ordered them transferred to the Chief of the German Security Police. Varsaskis' prison card states that he was treated "in accordance with orders" on December 22, 1941. According to Dr. Arad, the phrase "dealt with in accordance with orders" was a German euphemism meaning that the prisoner was killed.

Dr. Arad provided another example where two Jews, Gitta Kaplan and her six-year-old daughter Fruma, were

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supra discussion Part I.

arrested by the Vilnius *Saugumas* for escaping from the ghetto. Thereafter, the *Saugumas* ordered them transferred to the Chief of the German Security Police, and both were "dealt with in accordance with orders" on December 22, 1941. As to the arrests of Gitta and Fruma Kaplan, the *Lileikis* court noted as follows when it considered this same evidence:

> The arrest of a woman solely because she was suspected of being a Jew, and the confinement of a six year old girl in a hard labor prison for "hiding" after being spirited from a ghetto by her mother, would satisfy even the most liberal construction of the term "persecution."

929 F. Supp. at 39 n.14.

Dailide argues that Dr. Arad's opinion as an expert should be discounted because he had "no personal knowledge" of the *Saugumas* when he drafted his affidavit. He raised this same argument below in his motion to bar Dr. Arad as a witness. The district court denied Dailide's motion and found that Dr. Arad was competent as an expert. In reviewing the record, we find no reason to doubt Dr. Arad's competence; his affidavit cites the facts and documents upon which his opinion is based, and his opinion is well-informed. More importantly, experts may base their testimony upon information not within their personal knowledge or observation. *See* Fed. R. Evid. 702, 703. In addition, it should be noted that the *Lileikis* Court found that Dr. Arad's analysis of some of the same Lithuanian documents used in this case was credible when used in Lileikis' denaturalization proceeding. *See Lileikis*, 929 F. Supp. at 38; *see also Backes v. Valspar Corp.*, 783 F.2d 77,

79 (7th Cir. 1986) (finding that a witness' testimony in a closely related suit indicates competence).[6]

Based upon the Stahlecker Report and events documented in Dr. Arad's affidavit regarding the activities of the *Saugumas*, we hold that no genuine issue of material fact remains as to whether the *Saugumas* assisted the Nazi regime

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[6] Dailide also argues that Dr. Arad's affidavit was prepared jointly by Dr. Arad and Michael MacQueen, a historian and member of the government's litigation team; and thus, Dailide alleges the affidavit cannot be used because it was not totally based on Dr. Arad's personal knowledge. In his deposition, Dr. Arad stated that he prepared his entire affidavit, partly on his own and partly in consultation with MacQueen. Dr. Arad also stated that MacQueen assisted him in preparing his report. Dr. Arad's actions were proper under Fed. R. Civ. P. 26(a)(2)(B) which provides that an expert is required to submit a written report prepared and signed by a witness, and that the report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor . . . ." *Id.* As noted in the Advisory Committee Notes,

> Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports . . . . Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.

Here, both Dr. Arad's affidavit and report cites the bases for his opinions, and Dr. Arad signed the report and swore to the accuracy of its contents in compliance with the rule.

in persecuting the Jews in Lithuania, particularly during the time when Dailide was a member of the *Saugumas* - that being the years 1941 through 1944. Accordingly, we must now examine Dailide's role as a member of the *Saugumas* to determine whether a genuine issue of material fact remains that Dailide assisted the *Saugumas* in this persecution.

2. Individual Conduct of Dailide

It is undisputed that Dailide was an active member of the *Saugumas*. He conceded to detaining and searching Jewish civilians escaping from the ghetto, to interviewing prisoners held at Lukiskes prison, and to carrying a police sidearm. This admission by Dailide in itself shows that no genuine issue of fact remains for trial as to whether Dailide assisted the *Saugumas* in persecuting Jewish civilians. In *United States v. Osidach*, 513 F. Supp. 51, 99 (E.D. Penn. 1981), the court found that the defendant's "role as an armed, uniformed interpreter for either the Ukrainian police's or the German gendarmes' interrogation of suspects could be classified as both physical and mental persecution." The court reasoned that:

> The mere presence of the watchful eye of the conqueror or his deputies, coupled with the often demonstrated presence of both the means and the inclination to persistently inflict various indignities, physical abuse, injuries or even death, without notice or reason, is the personification of mental persecution, to anyone, let alone innocent civilian men, women and children reduced to various

> degrees of substandard mental and physical well-being.

Id.

Similarly, as in *Osidach*, Dailide's act of interviewing prisoners held at Lukiskes Prison, which as stated previously was an intermediate stop to Paneriai, constituted mental persecution. Dailide admitted that, while at the prison, he would be escorted by a guard to a room, and the guard would then bring in the prisoner to be interviewed. Dailide would then ask the prisoner various questions, including the prisoner's history and the reason for his arrest.

At the time of Dailide's interviews, the jails were overcrowded. There was a need to screen prisoners and separate out the innocently arrested from the serious offenders as defined by the Germans, - i.e., criminals, Communist functionaries, politruks, and others the Germans considered "riffraff" - so that the serious offenders could be liquidated. As stated by Dr. Arad, the data that Dailide obtained from his interviews was used to determine which prisoners would be released and which prisoners would be liquidated, and according to SS Colonel Jaeger, the task of interviewing the prisoners held at the Lukiskes Prison was one of the *Einsatzkommando's* most important tasks in fulfilling the Nazi regime's ultimate goal of genocide. Thus, it is reasonable to conclude that to prisoners held at Lukiskes, the answers that they provided to Dailide during his interrogation determined whether they lived or died. Although it is true that this Court is not bound by the Eastern District of Pennsylvania's holding in *Osidach*, we embrace the *Osidach* court's sound reasoning and analysis. We decline the dissent's invitation to put form

over substance and ignore the *Osidach's* court's logic and legal acuity, particularly under the compelling and undisputed facts of this case.

In addition, we disagree with the dissent's contention that a genuine issue of fact exists for trial as to whether Dailide assisted the *Saugumas* in the persecution of Jewish civilians because Dailide claims that he was not armed when he interrogated the prisoners at Lukiskes, inasmuch as he was not issued the weapon until he was assigned to do field work in 1942. We do not believe that Dailide's being armed or unarmed at the time of the interrogation rises to the level of a genuine issue of material fact for trial. The issue of Dailide's assistance in the persecution of innocent Jewish civilians is not dependant upon whether he was armed at the time; rather, it is Dailide's acts as a uniformed member of the *Saugumas* which are at issue. Reviewing such acts, it is undisputed that Dailide was a uniformed member of the *Saugumas* when he interviewed the prisoners, that he was accompanied by a guard when escorted to the prisoners' cells, and that the prisoners were put to death depending upon how they answered the questions asked of them. Accordingly, whether Dailide was armed or unarmed, these defenseless Jewish civilians were at his mercy. It is irrelevant whether Dailide actually "pulled the trigger" in this chain of genocide where his acts proved him to be an inextricable link in the ultimate result -- the death of innocent Jewish civilians. *See Anderson*, 477 U.S. at 248 (finding that a fact is "material" for purposes of summary judgment only if its resolution will affect the outcome of the lawsuit).

It is impossible for this Court, or any free citizen of the United States who has never known the fear of being occupied

by an enemy, to fully appreciate the terror and sense of desperation that must be felt by the mere presence of an enemy official, particularly at the time of the Nazi regime. However, to the best that anyone standing in our shoes is able to do so, we find that Dailide's acts of interrogating these defenseless prisoners -- who had been forced to suffer the physical atrocities of living in the ghettos -- to be the height of mental persecution. These defenseless prisoners, whose only offense was escaping from the plight of the ghettos, knew of the genocide at the time and realized that they could fall prey to Adolf Hitler's goal depending upon how they answered the questions Dailide asked of them.[7]

Although we hold that Dailide's admission of interviewing prisoners in this case to be sufficient as a matter of law to find that Dailide assisted in the persecution of Jewish civilians, we are further persuaded in our decision by four documents presented by the government.

Document 1, the Milinavicius Report dated October 31, 1941, states in relevant part:

> It has been reported to me that two Jews, IZRAEL SOAK and RIVA SOAK, are staying overnight at Apt. 2, 51 Krokuvos Street, the residence of LEON LEJSAK, a citizen of Polish nationality. They have escaped from the

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[7] The dissent's claim that Judge Nelson does not express an opinion on this line of reasoning is wrong. Judge Nelson expressly states in his concurrence that he concurs in "the affirmance of summary judgment for the United States and in most of the reasoning . . . aptly set forth" in this part of the opinion.

> Ghetto with the objective of leaving for Beniakonys. They were waiting for a truck at the residence of the above listed Pole. LEON LEJSAK probably has contacts with Jews, and he himself said that he knew that they were waiting for a car. Officers LEONAS KAULINIS and *ALGIMANTAS DAILIDE* took part with me. We conducted a search and arrested (*sulaikyti*) the Jews on 30 October.

(J.A. at 136.) (emphasis added). Dailide argues that the government mistranslates the word *sulaikyti* to mean "arrest" rather than "detain," and that the above document suggests that a "personal" search was done rather than a search of the premises. Regardless of which translation is applied, the record indicates that the Jews were taken into custody and placed in prison; therefore, they were "arrested' in every sense of the word.[8]

Document 2, the Regina Report, dated October 31, 1941, states that several officers, including Dailide, detained twelve Jews attempting to escape from Vilnius in the direction of

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[8] Dailide argues that the government misconstrues the reason why words such as "Pole" and "Jew" were used in *Saugumas* documents. The government used these references as evidence of persecution. Dailide claims, however, that this terminology was not used for those purposes, but instead as identifying adjectives, noting that similar identification procedures are used in the police departments in the United States. Regardless of the intended purposes, it is clear that the Jews referred to in the four documents presented by the government were being arrested for trying to escape from the ghetto.

Lyda. The list of Jews detained included the Soaks mentioned in the Milinavicius Report. The report further states that "all were transported to the Security Police; a personal search was performed, and they were placed into the jail." This report clearly rebuts Dailide's contention that the Jews were merely detained and then released.

Document 3, the List of Jews Arrested by the Lithuanian Security Police, dated November 5, 1941, indicates that the Soaks and the other ten Jews still remained incarcerated as of November 5, 1941. The report ends by stating that all the Jews are in the Lukischkiai Prison and at the "disposition of the German authorities".

Finally, Document 4, the Dailide Report dated November 3, 1941, states that Dailide executed a personal search of "the Jew Mark Sapyro." Dailide inventoried several items including money which was turned over to the Germans. Mark Sapyro was listed on Document 3 as Mark Sapiro, and thus, was at the "disposition of the German authorities", as well. According to Dr. Arad, this "handover to the German Security Police . . . almost inevitably meant death by shooting at Paneriai."

Furthermore, two affidavits in the record also support the conclusion that Dailide assisted in the persecution of Jewish civilians, and thus was not eligible for a visa. The affidavit of Daniel Ashe, Case Analyst for the DPC from December 1948 to September 1949, stated that if any one of the allegations by the government were true (i.e., Dailide's active service in the Nazi controlled *Saugumas*, and Dailide's individual conduct such as arresting and inventorying the possessions of Jews), Dailide would not have been eligible for admission into the

United States. The affidavit of Michael Thomas, Chief Eligibility Officer for the entire IRO and co-author of the IRO Manual, states as follows:

> An applicant for IRO relief who had served in the Lithuanian Security Police during the Nazi occupation and (1) participated at any time as an armed police officer in the arrest of Jews attempting to escape the Vilnius ghetto or (2) participated as an armed police officer in the search of one or more Jews and/or confiscated their money to be turned over to Nazi authorities, would have been ineligible for IRO relief under Part II (a), Annex I of the IRO Constitution, which precluded giving IRO relief to those who assisted the enemy in persecuting civil populations.

(J.A. at 641.)

We find that these documents show that no genuine issue of material fact remains for trial that Dailide assisted the *Saugumas* in the persecution of Jewish civilians, particularly when coupled with his admission as discussed earlier. Clearly, Dailide's acts, as detailed in these documents, went well beyond the innocuous (such as the barber who worked for the *Saugumas* and cut the Jewish prisoners' hair); rather, Dailide's actions provided an inextricable link in the Nazi regime's chain of genocide. Accordingly, because Dailide assisted in the such persecution, he did not obtain a valid visa into the United States as a matter of law. *See Fedorenko*, 449 U.S. at 505.

We reject the arguments that these documents merely show that Dailide participated in "rounding up" or detaining Jewish civilians trying to escape from the ghettos, and that "persecution" is nowhere defined either literally or figuratively for purposes of barring him from receiving displaced-person status. It is not difficult to see the fallacy of these arguments which we find to be contrary to the requirements of the naturalization process. By arguing that "persecution" is not adequately defined, the dissent seems to be making the illogical and unreasonable claim that "rounding up" Jewish civilians for purposes of turning them over to the Nazis for imprisonment or death does not satisfy the commonly understood definition of "persecution." To say that a reasonable person could conclude that Dailide's acts, as made known through these documents, would not have been regarded as sufficiently persecutory to bar him from receiving displaced-person status is completely unpersuasive. Contrary to the dissent's contention, the issue here does involve whether "Nazis are evil;" indeed, it is the Nazis' "evilness" in persecuting civil populations which makes assisting them in such acts a basis for denaturalization. But for Dailide's efforts in assisting the Nazis in their evil enterprise, we would not be visiting this issue today, nor would Dailide have had reason to lie when he applied for his visa to gain entry into this country, as will be discussed in the next section.

V.

Whether Dailide Willfully Misrepresented Material Facts about his Wartime Activities

Dailide argues that the lower court erred in finding that no genuine issue of material fact remained for trial that he

misrepresented facts about his wartime activities when applying for an immigration visa. Once again, we disagree.

Section 10 of the DPA states the following: "Any person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." The phrase "misrepresentation for the purpose of gaining admission into the United States" has been defined as wilful misrepresentation, oral or written, to any "person while he is charged with the enforcement or administration of any part of the act, of any matter, material to an alien's eligibility for any of the benefits of this act." 8 C.F.R. § 700.11 (1950).

When applying for his DPA visa, Dailide completed a personal history form prepared by CIC. The CIC conducted investigations and interviews of applicants on behalf of the DPC, which administers the DPA. DPC case analysts were responsible for reviewing all of the documentation concerning each applicant to determine the applicant's eligibility and desirability to enter the United States. According to Ashe, standard procedure called for the analysts to review the file of an applicant, including information received from the CIC and other agencies. The DPC case analyst usually did not interview the applicants again. After reviewing the information contained in an applicant's file, the DPC case analysts prepared a final report. If the application was approved, it was then forwarded to a Vice Consul for further review. If the application was approved by a Vice Consul, an immigration visa was authorized.

Here, Dailide claimed on his personal history form that during the years 1942 through 1944, he was employed as a "practitioner forester" in Vilnius, Lithuania. In addition, Dailide's personal history form also indicates that he denied any police service membership. This form was sent by the CIC, with other relevant documents to the DPC. The DPC's final report prepared by a case analyst, repeats the "practitioner forester" misrepresentation virtually verbatim.

While acknowledging these statements in his personal documents, Dailide claims that they do not constitute wilful misrepresentations because he concealed his membership in the *Saugumas* for fear of repatriation to the Soviet Union. We are not persuaded by Dailide's argument where it has been found that an individual giving "false information in connection with his application for a DPA visa so as to avoid the possibility of repatriation to the Soviet Union" has made a willful misrepresentation for the purposes of § 10 of the DPA. *Fedorenko*, 449 U.S. at 507. In addition, because we have concluded that Dailide's individual conduct of assisting the *Saugumas* in the persecution of Jews would have rendered him ineligible for a visa, we also find that such wilful misrepresentations were material. *See id.* (finding that § 10 of the DPA only applies to willful misrepresentations about "material" facts, and that a misrepresentation is material if disclosure of the true facts would have made the applicant ineligible for a visa).

Dailide argues, however, that he did not violate § 10 of the DPA because his alleged misrepresentations were to the CIC, an organization that is not "charged with enforcement or administration" of the DPA. Dailide notes that the misrepresentations appeared on the CIC questionnaire, which

was included in his CIC file; thus, he argues that since he did not make misrepresentations directly to the DPC, an organization charged with administration of the DPA, he did not violate § 10 of the DPA.

In support of the foregoing contention, Dailide cites several decisions from the Bureau of Immigration Affairs ("BIA"), and a 1951 letter from Attorney General McGrath to the Chairman of the BIA ("McGrath Memorandum"). We find only two of the BIA cases to be relevant: *In re Suess et al.*, Nos. A-7927755-57 (Sept. 26, 1951), *approved by Att'y Gen.* (Oct. 16, 1951), and *In re Altman et al.*, Nos. A-7991300-01 (Sept. 26, 1951), ***approved by Att'y Gen.*** (Oct. 16, 1951).

In *Suess*, the applicant admitted that she deliberately, knowingly, and falsely informed the representatives of the IRO and the CIC that she resided in Germany during a period of her absence from Hungary. She claimed she falsified her whereabouts for fear that she would be denied entry into the United States under the DPA. The applicant voluntarily disclosed her falsity when she made a sworn application for a visa. The BIA held that the CIC was not charged with enforcement of the DPA, but only with assisting the DPC in carrying out its responsibilities. Therefore, inasmuch as the misrepresentation was only made to the CIC, the BIA held that the applicant did not violate § 10 of the DPA.

Similarly in *Altman*, the applicants misrepresented to both the IRO and the CIC exactly when they entered Germany. That information was passed to the DPC. A DPC case analyst reviewed the documentation, and disqualified the applicants, not because of the misrepresentation, but for lack of required

residence in Germany. Thereafter, the case was renewed, the applicants were called before the case analyst and placed under oath. They revealed the true facts, and confessed to the false statements. Citing *Suess*, the BIA held that since the applicants never gave false statements to the DPC, § 10 of the DPA did not apply. However, it was noted that had the applicants persisted in their false statements before the DPC case analyst, a different result would have occurred.

The *Suess* and *Altman* cases can easily be distinguished from the case at hand. In both of these cases, the DPC never relied on the misrepresentations because the applicants recanted their statements before approval by the DPC. Here, Dailide never recanted the statements made to the CIC. As noted in the *Altman* decision, without the applicants' recantation, they would have been found liable under § 10 of the DPA. Moreover, it is clear the DPC relied on Dailide's misrepresentations; the DPC report repeats almost verbatim the false employment history of Dailide.

Furthermore, the above cases can be distinguished because they dealt with misrepresentations concerning residency and should be limited to only that situation. The McGrath Memorandum buttresses this point in stating as follows regarding the interpretation of the *Suess* and *Altman* decisions:

> At the time I approved the Board's orders in these cases, my decision was necessarily based on the individual records presented to me for review. Since the receipt of your memorandum I have reexamined the entire question and have had discussions with members of my staff.

Had I had the additional background information furnished in your memorandum, as well as the discussions had with my staff, at the time I considered the *Suess* and *Altman* cases, *I might have arrived at a different conclusion*. However, in view of the fact that many cases probably have already been processed in the light of these decisions and the fact that the program is drawing to a close, I am not disposed to disturb these decisions at this time. The decisions, however, should be *limited to stand for the following propositions*:

(1) *A misrepresentation as to residence*, is a misrepresentation as to a material fact and when made to the Displaced Persons Commission, to a United States Consul, or to the Immigration and Naturalization Service, constitutes a misrepresentation within the contemplation of Section 10 of the Displaced Persons Act.

(2) *Such misrepresentation* to the Counter Intelligence Corps of the United States Army, even if wilfull [sic] and as to a material fact, is not a misrepresentation within the contemplation of Section 10, since the Counter Intelligence Corps is not an agency charged with the enforcement or administration of the Displaced Persons Act.

(J.A. at 410.) (emphasis added).

Attorney General McGrath notes in his memorandum that had he contemplated the question further, before rendering a decision, he may have reconsidered his approval of these cases. In light of this fact, McGrath limits the holding of these cases to apply only in situations of misrepresentations of residency. In addition, the McGrath Memorandum expressly states that the holdings in both *Suess* and *Altman* are limited to misrepresentation "as to residence."[9] Because Dailide's false statements concerned his involvement in the persecution of civilian populations, not residency, neither *Suess* nor *Altman* support Dailide's contention.

VI.

For the foregoing reasons, we **AFFIRM** the district court's order granting the government's motion for summary judgment on Counts I and IV of the government's complaint. In doing so, we are mindful of the heavy burden placed upon the government in a denaturalization proceeding; however, we are also mindful of the requirement for Dailide to have strictly complied with congressionally imposed prerequisites

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[9] The dissent's attempt to expand Attorney General McGrath's position by making the bald-faced assertion that "the bare fact of a false statement to the CIC does not violate Section 10" based on this Memorandum is without support in the record. Attorney General McGrath expressly limited the holding of *Suess* and *Altman* to those material misrepresentations as to "residency." The Attorney General could easily have adopted the BIA's answer to the posed question which would have included all false statements to the CIC, but he expressly declined to do so.

of citizenship. Under these facts, we cannot imagine a more compelling case for finding noncompliance as a matter of law, where no genuine issue of material fact remains that the government's overwhelming evidence against Dailide is "clear, unequivocal, and convincing." For us to find otherwise under these facts would be a travesty and would serve no purpose but to allow a persecutor who willfully participated in Adolf Hitler's attempt to eliminate the Jewish population through genocide to enjoy the fruits of being a United States citizen -- no greater insult could be done to the spirit and purpose of the principles upon which this country was built.

Parenthetically, it must be said that the dissent's attempt to minimize the force of the opinion and holding of the majority by pointing out that Judge Nelson's concurrence rests on his agreement that Dailide assisted the enemy in the persecution of civil populations is out of line and misplaced. First, contrary to the dissent's mischaracterization, Judge Nelson's concurrence does not rest solely on Dailide's participation in the arrest of two Jews fleeing the Vilnius ghetto. Rather, an accurate reading of Judge Nelson's concurrence indicates that he concurs in the affirmance of summary judgment for the United States as well as in "most of the reasoning . . . ably set forth in Part IV" of this opinion. Accordingly, the reasoning of the concurrence is not limited to "the minimum ground" that Dailide assisted in the arrest of two Jews. Second, the concurrence expresses no opinion one way or the other as to whether Dailide made willful misrepresentations of material fact in gaining entry into this country; therefore, although the concurrence does not expressly agree with the position set forth in this opinion, it does not agree with the dissent's position either. Finally, the

government may prevail in this case by proving *either* Count I or Count IV; it need not prove both counts against Dailide. Thus, the dissent's opening "clarification" that when it refers to this opinion as being "of the court" only to the extent of Judge Nelson's concurrence, shows nothing except perhaps the dissent's dissatisfaction in not having its viewpoint prevail in this case.

CONCURRENCE

DAVID A. NELSON, Circuit Judge, concurring in part. I concur in the affirmance of summary judgment for the United States and in most of the reasoning, if not all of the rhetorical flourishes, ably set forth in Part IV of Judge Clay's opinion. There is no genuine issue over the fact that Dailide assisted in the detention of Izrael and Riva Soak, Jews who had escaped from the ghetto and who were turned over to the Germans for imprisonment. In helping to deprive these individuals of their freedom - which he unquestionably did, whether he personally was carrying a sidearm at the time or not - I believe that Dailide "assisted the enemy in persecuting civil populations" of countries, Members of the United Nations," within the meaning of those words as used in § 2(b) of the Displaced Persons Act of 1948. I express no view on the question whether summary judgment in favor of the government could also be affirmed on the basis of the misrepresentations Dailide made to the U.S. Army's Counter Intelligence Corps about his wartime activities.

DISSENT

BOGGS, Circuit Judge, dissenting.

PROCEDURAL SUMMARY

The district court granted summary judgment to the government on two grounds. I would reverse the district court because I believe that neither ground can be supported as a matter of law, and I explain why in my opinion below. In my dissent, I refer to Judge Clay's opinion as being that of "the court" though it is so only in its conclusion of affirmance and to the extent of Judge Nelson's concurrence. Judge Nelson's concurrence, based on the minimum ground that Dailide's participation, in whatever capacity, in the arrest of two Jews fleeing the Vilnius ghetto is sufficient to establish his legal status as a persecutor is, of course, the only holding of the majority of the court. As I also explain below, I would hold that such participation, when the circumstances are disputed and the legal import is unsupported, is an inadequate basis to strip an American citizen of his citizenship without a trial. I therefore dissent from the court's judgment and opinions.

SUBSTANTIVE SUMMARY

Dailide was a member of the *Saugumas* and the *Saugumas* assisted the Nazis in committing atrocities and persecutions. The government has proven this conclusively. If that were enough to affirm the district court, this would be an easy case. But even the government does not seriously argue that this is enough, and the court correctly so holds, *supra* at 11.

Instead, to affirm the district court, we must find that there is no genuine issue of material fact as to Dailide's violation of the immigration laws. Contrary to the court's opinion, *supra* at 8 n.3, it is much harder to meet a burden "as a matter of law" when you must take all facts and inferences in the light most favorable to the defendant, rather than having a trial and making findings of fact.

It may well be that Dailide should be denaturalized and deported, after a finder of fact has looked at all the evidence and made findings about who is lying and who is telling the truth. At this stage, however, our law does not allow the stripping of American citizenship from Dailide when many material factual matters are in dispute.

In very brief summary, the court errs on both of the key issues.

As to Count IV, misrepresentation, it is undisputed that Dailide signed a personal history form, taken by the Army Counterintelligence Corps (CIC), which was false in two major respects. It is also undisputed, or not affirmatively contended, that Dailide did not repeat this, or any other misrepresentation, on any subsequent document that he submitted to Immigration authorities - not on his visa application, or on any subsequent immigration or naturalization document. Nor does it appear that he made any misrepresentation when interviewed by the relevant Vice Consul, though that could be controverted.

So, the issue is whether this misrepresentation was made to one "charged with the enforcement" of the Displaced Persons Act as required by 8 C.F.R. § 700.11 (1950). On its

face, the question appears to be in dispute. There is nothing on the CIC form that says it is for immigration purposes. Nothing on any subsequent form asked that he affirm the CIC form. As detailed at greater length infra at 49-52, the Attorney General at the relevant time specifically held that the CIC was not such an agency. The court relies on the fact that the circumstances in those cases can be distinguished factually, but the differences in factual circumstances cannot alter the general role of the CIC, as held by the Attorney General.

If the question were whether a particular police officer had general arrest powers in a certain town, and there were a binding precedent that he did not, the fact that the earlier case involved a robbery and the case at issue involved a homicide would not invalidate the earlier precedent.

If factual development and findings were to prove that in completing the CIC form, Dailide knew that he was in fact submitting the material for consideration by the DPC, then it might be that he could be held to have knowingly misrepresented to someone "charged with enforcement" of the act. But again, the government does not argue, at this stage, that such is true as a matter of undisputed fact, only that, in general, the CIC forms were relied on by the DPC.

The second issue, the charge of assisting in persecution under Count I, is even more bound up in disputed facts. Again, after a trial, it may well be that a finder of fact could determine that Dailide's account is not truthful, and that he met the standards established by law for assisting in persecution. However, under the standards developed, it is a very key question whether Dailide was armed when he

participated in the arrest of certain fleeing Jews, and when he took part in the search of particular prisoners. Dailide's accounts can be read two ways, and are certainly not undisputed.

There is also a key factual dispute as to the nature of that search and of Dailide's questioning of prisoners. The court's expansive account of that questioning, *supra* at 15-16, may be correct. However, it is not supported by undisputed facts in the record, and thus cannot be taken, at this stage, as a correct statement for purposes of summary judgment. Dailide's account, and the face of the documents in which he is specifically mentioned, are consistent with a history in which he was no more than a glorified desk clerk, filling out forms and recording prisoner responses.

Again, that account may not be true, but it must be taken as such on summary judgment.

The crucial difference between summary judgment and full trial is shown by two cases. In *United States v. Osidach,* 513 F. Supp. 51 (E.D. Pa. 1981), heavily cited by the government and relied on by the court, there was a full trial, and a judge made findings of fact about what Osidach did.

On the other hand, in the case of *United States v. Lindert,* 907 F. Supp. 1114 (N.D. Ohio 1995), a man who was a gun-toting SS guard at a Nazi death camp was found, after a full trial, not to have assisted in persecution, because his specific acts were found to be sufficiently peripheral to the actual persecution. The government chose not to exercise its right to appeal from that verdict.

In short, Dailide may be a very bad man. In any event, he has much to answer for in a moral sense. But before we can strip him of United States citizenship, we must follow the rules, especially the rules that make summary judgment quite different from verdict after a trial. This is what the court overlooks today, and I therefore respectfully dissent.

I

A

Dailide was born in Lithuania in 1921. He was a student in forestry school in Vilnius when the Soviet Union conquered Lithuania in 1940. Not long after the annexation, Dailide was expelled from school for his opposition to communism.

When the Nazis invaded Lithuania in June 1941, the Lithuanian Security Police (known as the *Saugumas*) were reconstituted to help the invaders keep order by performing searches, arrests, and investigations. Dailide was hired as a *Saugumas* clerk in June. He claims that he worked in the office and, on occasion, interviewed arrestees brought in on their way to the nearby Lukiski prison.

Dailide became a *Saugumas* "police candidate" in August, around the time that the infamous Aleksandras Lileikis became the local *Saugumas* chief. *See United States v. Lileikis*, 929 F. Supp. 31 (D. Mass. 1996) (rejecting Lileikis's "just following orders" defense and revoking his citizenship). Dailide worked in the Communist Section of the *Saugumas* for a brief period (he claims it was for about two weeks in late August). According to Dailide, the purpose of the Section was to obtain information on communists and potential

revolutionaries. After his service in the Communist Section, Dailide was transferred to the Information Section, where he says his job was to gather background information on prospective employees to ensure that they were not communists. Around the end of 1942, Dailide states that he received a field assignment, for which he was issued a firearm -- he notes that three officers were killed by communists -- though there is no evidence that he ever used it.

Aside from these activities, it is clear from the record that the *Saugumas* also assisted the German invaders in their persecution of Lithuania's Jews, though Dailide claims he had no knowledge of any such link. He also says that he had no knowledge above the level of rumor of the murder of the Jews. Regardless of what Dailide knew or did not know, many of the Jews in Vilnius were arrested and sent to prison, then marched out in groups to Paneriai, a wooded area near Vilnius, and shot. By the end of 1941, 30,000 were dead. The remaining Jews were confined to ghettoes. One ghetto was liquidated in 1941, the other in 1943. In all, 55,000 Jews were killed. *See generally Lileikis*; *United States v. Balsys*, 918 F. Supp. 588 (E.D.N.Y. 1996), vacated, 119 F.3d 122 (2d Cir. 1997), reversed by 118 S. Ct. 2218 (1998).

The reconstituted *Saugumas* was placed under the control of the *Einsatzkommando*, the Nazis' mobile killing units, there being no Lithuanian civilian government to which the *Saugumas* would have reported after August 1941. Among their other duties, the *Saugumas*, plain-clothed police, were responsible for locating Jews hiding outside the ghetto, for capturing escapees, and for breaking up document-forgery rings. Arrestees were transferred to Lukiski prison and most were apparently killed, with contemporaneous records noting

this euphemistically. The government states that the *Saugumas*'s Communist Section (which it calls the Communist-Jews Section) was responsible for, among other things, apprehending and interrogating Jews and those who assisted them.

B

In 1944, the Soviet Army swept back into Lithuania. Dailide fled to Germany, where he lived in the American sector until 1950. He and others discussed whether they should reveal their *Saugumas* service in applying for emigration, and decided against it. Dailide's emigration process had three steps. First, he had to qualify as a refugee within "the concern" of the International Refugee Organization (IRO). IRO Constitution, 62 Stat. 3037, 3051 (1948). Then he had to receive a determination of displaced-person status by the DPC (Displaced Persons Commission). Finally, he had to qualify for and receive a visa from the United States Department of State.

In 1949, apparently after qualifying as a refugee (a status conferred by an IRO field eligibility officer, applying the standards of the IRO Constitution), Dailide completed a questionnaire from the United States Army counter-intelligence corps (CIC), as part of his application for displaced-person status. Although he says that he was not the one who physically filled out the form, he does not deny that he signed it. The questionnaire asked Dailide for an "exact description" of his activities during the war. Dailide said that from 1942 to 1944, he had been a "practitioner forester" in Vilnius. Asked if he had been a member of any police service or civil service, Dailide answered "No." Dailide eventually

received displaced-person status. In 1950, Dailide applied for an immigration visa under the Displaced Persons Act. Dailide received his visa, moved to Ohio, and received citizenship in 1955.

C

When the Soviet Union collapsed, *Saugumas* records became available to outside investigators. In July 1993, INS agents and Office of Special Investigations (OSI) personnel interrogated Dailide at his office in Cleveland. On December 7, 1994, the government filed a six-count complaint that charged Dailide with illegal procurement of United States citizenship and that sought to revoke Dailide's citizenship and cancel his Certificate of Naturalization. The government then filed for partial summary judgment on counts I and IV. Count I alleged that Dailide had assisted in persecution, in violation of the Constitution of the IRO, 62 Stat. 3037, 3051-52 (1948), and in violation of 8 U.S.C. § 1427. Count IV accused Dailide of material misrepresentation, in violation of the Displaced Persons Act, 62 Stat. 1009, 1013 (1948), and of 8 U.S.C. § 1427.

In December 1996, the district court announced that it would grant summary judgment against Dailide on the two counts. In February 1997, the court entered an amended order granting summary judgment, *United States v. Dailide*, 953 F. Supp. 192 (N.D. Ohio 1997), and the remaining counts were dismissed without prejudice.

Dailide filed this timely appeal.

II

A

A decision to reverse the district court is a difficult one. There is significant evidence that Dailide helped to arrest Jews fleeing from the ghetto, most of whom were probably killed by the Nazis soon afterward. Dailide lied at times about some of his activities. I would not vindicate Dailide in either the legal or moral senses of that word, and the government might well be able to prove at trial that Dailide should be stripped of his citizenship. Nevertheless, I believe the law is clear that the district court erred in granting the government summary judgment without the type of full trial necessary to determine genuine issues of facts material to the legal (if not the moral) issues in this case.

This conclusion is not a novel one. As the Supreme Court said, newly cognizant of the evils of World War II:

> Denaturalization actions present extremely serious problems. They involve not only fundamental principles of our political system designed for the protection of minorities and majorities alike. They also involve tremendously high stakes for the individual. For denaturalization, like deportation, may result in the loss of all that makes life worth living. Hence, where the fate of a human being is at stake, we must not leave the presence of his evil purpose to conjecture.

Knauer v. United States, 328 U.S. 654, 659, 90 L. Ed. 1500, 66 S. Ct. 1304 (1946) (Douglas, J.) (quotation marks omitted).

More specifically, the Supreme Court has long made it clear that the government "carries a heavy burden of proof in a proceeding to divest a naturalized citizen of his citizenship," *Costello v. United States*, 365 U.S. 265, 269, 5 L. Ed. 2d 551, 81 S. Ct. 534 (1961), and so the government must present "clear, unequivocal, and convincing" evidence supporting denaturalization, *Fedorenko v. United States*, 449 U.S. 490, 505, 66 L. Ed. 2d 686, 101 S. Ct. 737 (1981).

B

The government's task is even more difficult when it seeks, as it did here, to win its case at summary judgment. Our summary-judgment standard requires that there be no disputed issues of material fact; that we view the facts in the light most favorable to Dailide; and that the government prevail only if it is entitled to a judgment as a matter of law upon such a view of the facts. *See* Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

Although the district court suggested that there is precedent for summary judgment in cases such as Dailide's, 953 F. Supp. at 195, the cases it cited as examples are all distinguishable in that the roles of their respective defendants were much more clearly established and more clearly persecutory. In the first case cited, that of *Lileikis*, the defendant was the head of the Vilnius division of the *Saugumas* and did not "deny that he personally ordered the

Saugumas officers under his command to cooperate with the Nazis in arresting, detaining, and delivering thousands of Jews to the death squads." *Lileikis*, 929 F. Supp. at 36. In the second case, the defendant was a Hungarian pro-Nazi propagandist and convicted war criminal, whose newspaper "played a prominent role in calling for Hungary's adoption of increasingly drastic anti-Jewish restrictions." *United States v. Koreh*, 59 F.3d 431, 436, 440 (3d Cir. 1995). Finally, in the third case cited, the defendant was a uniformed guard at the Mauthausen concentration camp and member of the SS Totenkopf-Sturmbann (Death's Head Battalion). *United States v. Leprich*, 666 F. Supp. 967, 967 (E.D. Mich. 1987). As discussed below, Dailide's actions, though hardly above reproach, do not rise near to this level, and thus cannot as easily be declared sufficient *as a matter of law. Cf. United States v. Lindert*, 907 F. Supp. 1114 (N.D. Ohio 1995) (concluding, after trial, that an armed SS member who served as a concentration camp perimeter guard did not participate in persecution and thus did not lack "good moral character" sufficiently to warrant denaturalization).

III

The following interplay of statutes forms the legal basis for this action. According to 8 U.S.C. § 1451(a), if a naturalization is illegally procured, that citizen loses his citizenship. Illegal procurement exists when "some statutory requirement which is a condition precedent to naturalization is absent at the time the petition [for naturalization is] granted." *Fedorenko*, 449 U.S. at 515 n.38 (*quoting* H. R. Rep. No. 1086, 87th Cong., 1st Sess., at 39 (1961) (alteration in Fedorenko)). One of the statutory conditions precedent is

that the applicant was "lawfully admitted" to this country for permanent residence. 8 U.S.C. § 1427 (a)(1).

The government claims two bases for concluding that Dailide was unlawfully admitted. First, as cited above, the IRO Constitution excludes from its protections any person who can be shown "to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations." Without IRO protection, there was no way for Dailide to obtain refugee status, and by extension displaced-person status, a visa, and citizenship. Second, also as cited above, the Displaced Persons Act renders inadmissible anyone who willfully misrepresents material facts for the purposes of gaining admission into the United States as a displaced person.

A

The government's charge that Dailide "assisted in persecution" has a factual predicate of two parts. First, in its original complaint, the government said that the *Saugumas* persecuted civil populations, and that Dailide assisted the *Saugumas*. There is a document in the record, written by a German Einsatzgruppe commander in October 1941, that bolsters the first portion of this syllogism:

> [A] Lithuanian Security and Criminal Police[1] force was created. . . . After careful

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[1] Dailide quibbles with parts of the translation of this document, as discussed below, but does not challenge the notion that the "Security and Criminal Police" referred to here is the *Saugumas*.

> investigation the extra auxiliary personnel needed was brought in. The Lithuanian Security and Criminal Police operates according to the orders and guidelines provided to them by *Einsatzkommando* 3 and its activities are under constant surveillance [*kontrolliert*] and, as much as possible, they are used for security police work which cannot be performed by the SD's own personnel, particularly searches, arrests, and investigations. . . .
> . . . . After the removal of the accused and unfit personnel and under the constant surveillance of Einsatzkommando 3, the Lithuanian Security and Criminal Police produced entirely satisfactory work . . . .

Dailide's translation changes the German word *kontrolliert* to "surveillance," rather than "control" as in the government's translation. The portion quoted above thus conforms to Dailide's preferred translation, saying "constant surveillance" rather than "constant control." Nevertheless, contrary to Dailide's argument, the passage still shows that the Germans staffed, purged, and directed the *Saugumas*.

The government alleges specifically that the Communist Section, of which Dailide was a member, helped to enforce the ghettoization of Vilnius's Jews. The district court apparently reviewed evidence that in 1941, certain Jews were arrested by the *Saugumas* for the "crime" of escaping from the ghetto, and were imprisoned at Lukiski, transferred to German custody, and killed. The record before this court has a German-language record of these people being arrested and

"dealt with in accordance with orders" a few weeks later, along with expert testimony backing up this account of procedures. The account of the killing of some of these same people is also discussed in *Lileikis*, 929 F. Supp. at 36.

Second, the government offers evidence of Dailide's personal involvement. The record contains the following report written by Adolfas Milinavicius, translated from Lithuanian (here using the government's suggested translation):[2]

> It has been reported to me that two Jews, IZRAEL S OAK and RIVA S OAK, are staying overnight at Apt. 2, 51 Krokuvos Street, the residence of LEON LEJSAK, a citizen of Polish nationality. They have escaped from the Ghetto with the objective of leaving for Beniakonys. They were waiting for a truck at the residence of the above listed Pole. LEON LEJSAK probably has contacts with Jews, and he himself said that he knew that they were waiting for a car. Officers LEONAS KAULINAS and ALGIMANTAS DAILID took part with me. We conducted a search and arrested the Jews on 30 October.

Dailide translates the last sentence (*Krata daryta ir ydai sulaikyti*) as "Search [of the apartment] was done and jews

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[2] The original documents are in the Lithuanian State Archives, which authenticated this and the other records cited below.

were detained." The meaning of *sulaikyti* as either "arrest" or "detain" is thus disputed, as discussed below.

Another report in the record bolsters the first document, as well as the government's translation of *sulaikyti*:

> To the Chief of Lithuanian Security Police, Vilnius Province Report
>
> I inform you that on 30 October of the current year, in agreement with EDVARDAS RAICEVIIUS (the informer) and together with the following officials: SKAUSGIRDAS, KAULINIS, MILINAVIIUS, DAILID, [and] DVILINSKAS at 7:00 p.m. we detained [*sulaikme*] the following individuals of Jewish nationality who were escaping from Vilnius in the direction of Lyda:
>
> [List of 12 names including IZRAEL SOAK and RIVA SOAK].
>
> All were transported to the Security police, a personal search was performed, and they were placed into the jail.
>
> The arrests [*sulaikymas*] took place exactly in the same order as the first one. The difference was that SKAUSGIRDAS went along to collect the Jews in Vilnius together with the driver, to guarantee that the car would not be stopped [*sulaikyta*] by the public police or by

> German police and the task would be carried out without disturbance.
>
> The same plan will be carried out in the case of other Jews attempting to escape.

At the very least, Dailide admits that he was involved in an operation to detain the Jews at the scene and send them back to the ghetto. The fact that these detainees were jailed, though, gives the lie to Dailide's claim that the Jews were only detained and then released.

So does a third document, this one in German, and written by *Lileikis*. It is entitled *Verzeichnis der Juden, die von litauscher Sicherheitspolizei festgenommen wurden*, translated as "List of Jews Arrested by the Lithuanian Security Police." The entry in the German document for October 30 parallels the second Lithuanian document, with the same 12 Jews listed. Dailide does not argue that *festgenommen* means anything other than "arrested," probably because at the end of the list it is stated that "at this time, all the Jews are in the Lukischkiai Prison and are at your disposition." Dailide does point out, though, that there is no direct evidence that anything sinister befell these people once they were sent to the prison. None of the prisoners mentioned above, *supra* at 37, as being "dealt with according to orders" [i.e., killed] appear on this arrest list. Furthermore, as Dailide notes, at least one person on the list managed to live long enough to die in Miami in 1996. *See* deposition of MacQueen, R. 99, Exh. C, at 52-56.

The final piece of evidence in the record cited by the government is a report written by Dailide himself. It is an

inventory from a personal inventory search he performed (or recorded, *see* Dailide 1995, dep. tab 118 to Gov't Motion for Summary Judgment, at 141-43) on Mark S apyro, a Jew. The search was done after an "arrest" [*sulaikyta*], though the context here can also imply that, as Dailide argues, sulaikyta only means "detention." The items included 2,443.50 rubles, turned over to the Germans, and a passport, which was kept from S apyro as well. Also included were permits, photos, a wallet, and a pocket knife, which were given back to S apyro. Letting a suspect keep these items if he was going to jail appears unlikely, though S apyro is found on the German list of arrestees. His ultimate fate is unclear from the record. This evidence is thus somewhat muddled.

At minimum, however, there is ample evidence that Dailide did participate in arresting Jews whose only "offense" was trying to escape from the ghetto; and that Dailide performed an inventory search of S apyro, whose passport was withheld and whose rubles were turned over to the Germans.

B

Dailide offers a scattershot attack on the government's evidence.

His first attack is on the translations of the above-recited documents offered by the government. He correctly notes that none of the government's witnesses are fluent in Lithuanian, and that therefore they had to rely on the official government translations, though he does not challenge the qualifications of the government's official translators. Dailide himself, as well as two of his witnesses, are fluent in Lithuanian, and

therefore have a certain additional (if not necessarily sufficient) level of credibility. As mentioned above, Dailide contends that the "arrests" were mere detentions, and that the "searches" of detainees were of apartments, not persons. The first quibble is not borne out by the context of the documents, and that the second is immaterial.

Dailide also attacks the government's claims that the *Saugumas* had a Communist-Jews Section. Government witnesses testified that references to such a section appear throughout the documents they reviewed. None of these documents are before us, however, and Dailide says that the section was known only as the Communist Section. However, other than reflecting on the credibility of the government's witnesses (a consideration that is irrelevant at the summary-judgment stage), the name of the section is immaterial.

Next, Dailide argues that the references to "Jews" and "Poles" in the documents, and used as evidence of persecution, have been misconstrued by the government. Rather than evidence of persecution of Jews *qua* Jews, Dailide says that these references are merely identifying adjectives, essential in a multi-cultural environment, and analogous to references to ethnicity in modern police reports. This may well be true at some level, but the Jews in question were clearly being arrested for trying to escape from the ghetto.

Dailide's heaviest attack is on the government's expert witness on the nature of the *Saugumas*, Dr. Yitshak Arad. Arad, the author of a doctoral dissertation and book on the Vilnius Ghetto, submitted a lengthy affidavit on the nature and role of the *Saugumas*, particularly its role in persecuting

the Jews of Vilnius. His testimony is based in part on primary sources, including some of the ones quoted above. Arad testified against John Demjanjuk, *see In re Demjanjuk*, 612 F. Supp. 544, 551 & n.4 (N.D. Ohio 1985) (speaking only of Ivan the Terrible in Treblinka, and not mentioning Demjanjuk), and, more relevantly, against *Lileikis*, *see Lileikis*, 929 F. Supp. at 37-38 (rejecting challenge to Arad's credibility and noting that Arad's testimony against Demjanjuk was not part of that which was discredited), in whose case he offered much of the same testimony as he does here.

Dailide first says that Arad lacks personal knowledge of the events about which he is testifying, in violation of Fed. R. Civ. P. 59(e). While Arad lacks contemporaneous, first-hand knowledge of life in Vilnius during the war, he is testifying as an expert witness, not a fact witness. Any evidence that would be admissible at trial can be presented in an affidavit. *See* 11 Moore's Federal Practice § 56.14[1][d] (3d ed.). Expert or "opinion" testimony is, by definition, not based on first-hand knowledge. Put another way, the "opinion" in the testimony is the personal "knowledge," and should be admissible so long as the court is made aware of the facts or expertise on which the opinion is based, and so long as the opinion is an informed one and belongs to the affiant. In this case, Arad's affidavit is adequately footnoted, referring back to the documents on which he relied, and Dailide has not challenged any of these citations. *See M & M Med. Supplies and Service, Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160 (4th Cir. 1992) ("An affidavit that states facts on which the expert bases an opinion satisfies Fed. R. Civ. P. 56(e) even though the expert does not attach the data supporting the facts. If need be, the court, acting pursuant to Fed. R. Civ. P. 56(e)

and Fed. R. Evid. 705, can require the expert to furnish the supporting data."); *Shaw v Strackhouse*, 920 F.2d 1135, 1139 (3d Cir. 1990) (similar).

Dailide next argues that Arad's affidavit appears to have been prepared at least partly by Mr. MacQueen, an OSI historian. In his deposition Arad says, referring to a report that formed the basis of the affidavit, that he wrote the parts about the German occupation and German policy himself, but that he prepared the section on the Lithuanian Police (the heart of the matter) "jointly" with MacQueen, the OSI historian. Arad also said that OSI edited the report for linguistics and style, presumably because Arad's primary language is Hebrew. In sum, Dailide says that Arad's crucial testimony -- crucial because it links the *Saugumas* to the Nazis and thus to the persecution and death of Jews -- cannot be used.

Dailide offers several arguments for this conclusion, each of which I would reject. First, Dailide argues that the testimony improperly relies on OSI-sponsored translations. But the individual translation "problems" that Dailide asserts, discussed more fully elsewhere, are all either unconvincing or immaterial. Second, Dailide implies that if the Arad affidavit is based on MacQueen's input, it is fraudulent to pass it off as Arad's sworn testimony based on personal knowledge. But Arad only ever said that he prepared the report jointly with MacQueen, as opposed to the affidavit. More importantly, Arad says only that the two men worked *together* in Vilnius reviewing the documentary evidence, not that MacQueen wrote the relevant section himself. Most importantly, Arad cites this documentary evidence in the affidavit, and he swears that the affidavit is true. Even if we accept Dailide's

account of MacQueen's role here, Arad's attestation, combined with his personal exposure to the documentary evidence upon which it is based, and his prior knowledge of the *Saugumas* based on other, German documents, is sufficient to make his testimony admissible.

Dailide also places great stress on the fact that Arad never mentioned the *Saugumas* in his book on the Vilnius Ghetto. True enough. Dailide twists context, however, taking the fact that the *Saugumas* did not participate in running the ghetto *internally* or police its *insides*, and using this to imply that this conflicts with the evidence that the *Saugumas* participated in arresting and imprisoning people who *escaped* from the ghetto. There is no inconsistency.

C

Though Dailide's attack on the facts thus fails, his attack on the law does not. That is, with all of the evidence that sticks to Dailide above, even using the summary-judgment standard, the government still needs to prove that these facts dictate that Dailide must, as a matter of law, lose his citizenship.

Judge Nelson's concurrence relies solely on the fact of Dailide's assistance "in the detention of Izrael and Riva S oak" as meeting the standard for "assisting the enemy in persecuting civil populations . . . ." If we were simply looking at an abstract definition of "persecution," I might agree, though I would be much more comfortable doing so after a judge had held a trial. However, we do not look at the issue in the abstract, but with the help of voluminous materials submitted by both sides. Those materials show that

the question of whether Dailide was an armed officer or not might well have been crucial on the IRO's contemporaneous determination. And the record shows that there is a genuine issue of material fact as to whether he was armed.

The government attempts to construct an objective standard for "persecution." Rather than trying to define it directly -- a problematic enterprise at the margins -- the government argues that contemporaneous decisionmakers would have regarded Dailide's conduct as sufficiently persecutory to bar him from receiving displaced-person status.

To this end, the government offers a deposition by Michael Thomas, who was the chief eligibility officer of the IRO from 1948 to 1950, and the author of the Eligibility Manual. The manual was mandatorily followed, and thus might have provided a basis for the objective standard; if Dailide was a persecutor by IRO standards, he never would have made it through the rest of the process. Unfortunately, the Manual does not define persecutors.

Dailide submits an affidavit by Jerome Brentar, an IRO screener. Brentar testified that persecution-assisters were, like war criminals, typically included on a list from the United Nations. If someone was not on the list, but there were accusers, countrymen of the applicant whose good faith the officer had no reason to doubt, the officer was to withhold a decision and contact the appropriate regional governmental authorities for more information. The Manual agrees with this account of the proper procedure.

Significantly, the decision by the screening officer was based in large part on the contents of a CM/1 Form. The CM/1 contained the applicant's answers to relevant questions. Unfortunately, Dailide's CM/1 is not in the record. Brentar says that without the form it is impossible to say whether Dailide would have passed eligibility. Brentar also notes that the *Saugumas* was not on a list of groups whose members were automatically disqualified.

Thomas says, however, that an ineligible person was an ineligible person, even if he was not denounced and was not on a list. The source of the damning information was irrelevant. On the other hand, Thomas continues, misrepresentation *per se* was not a disqualifier. In other words, an applicant's eligibility was based on what the truth was: if the truth was sufficient to warrant awarding refugee status, it did not matter that the applicant tried to conceal the truth; by contrast, if the truth was sufficient to warrant rejection, it did not matter how the IRO obtained that information.

What would have happened to Dailide had the truth been known? Crucially, Thomas said in his affidavit that if he had considered a case like Dailide's he would have excluded Dailide. But Thomas specifies that his conclusion assumes that Dailide "participated at any time as an *armed* police officer in the arrest of Jews attempting to escape the Vilnius Ghetto," or that he "participated as an *armed* police officer in the search of one or more Jews and/or confiscated their money to

be turned over to Nazi authorities."[3] (emphases added). All of these background assumptions have been established sufficiently for summary-judgment purposes, with the exception of one: whether or not Dailide was armed when he did these things.

The government claims that Dailide was armed throughout his service in the *Saugumas*, but the record[4] is not clear or consistent. In an interrogatory answer, he says he had a handgun, time unspecified, but never used it. *See* tab 125 to Motion for Summary Judgment, P6 (L). Dailide said in his

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[3] The government offered no evidence as to whether Dailide would have been ruled a persecutor merely for being in the *Saugumas*, which leads to the irrelevance of the bulk of the much-disputed evidence regarding the *Saugumas*'s general role.

For instance, we would not grant judgment as a matter of law against the *Saugumas*'s barber or shoeshine boy. While Dailide was obviously much more than a shoeshine boy, the determination of whether Dailide was closely enough linked to the persecutory activities of the *Saugumas* must necessarily shift to an examination of what Dailide himself did, which is precisely the analysis in this section.

[4] The government cites several documents in its attempt to establish that Dailide was armed. While all of these documents are in the full district-court record, the government did not include most of them in the joint appendix it submitted to this court. Although we were able to obtain the documents from the district-court record, confidence that the government has the required "clear, unequivocal, and convincing" evidence to support its position is undermined when the government does not even bother to submit that evidence to us.

1994 deposition that he was issued a Walther (German-made) handgun, that he was not trained in its use, and that he never used it. Tab 117, pp. 17-18. His 1995 deposition can be read to say he wore a gun when questioning people, though the time is not specified. Tab 118, pp. 152-153. In his affidavit submitted in response to the summary-judgment motion, though, Dailide stated that he was not issued his gun until he was assigned to do field work in late 1942, long after the critical events detailed in the documents cited above. Finally, when asked if he "used the gun," at the time of the arrest of the Soaks, he did not admit having a gun then. Tab 118, p. 146. Thus, the record does not establish for summary-judgment purposes that Dailide was armed when he performed the acts alleged by the government.

A court could conceivably conclude that Dailide's actions still constituted assistance in persecution even if he was not armed at the time. But the government's own affiant did not say this, however, apparently finding that armed status was important. And, as quoted by the court, *supra* at 14, the *Osidach* court found, after trial, that the defendant there was armed while undertaking his actions. There may be a difference between helping to round up escapees from the ghetto in a vague sense, and helping to round them up by pointing a gun at them. Perhaps the former could suffice for a finder of fact to rule against Dailide after a full trial, but I cannot conclude that it is sufficient at this stage in the proceedings. The government must present "clear, unequivocal, and convincing" evidence supporting denaturalization, and it must do so without any dispute as to material facts. It has not met that burden.

It should also be noted that most of the court's characterization, *supra* at 14-16, of Dailide's actions in the questioning of prisoners is far from undisputed. In particular, the key statement that "prisoners were put to death depending on how they answered the questions asked of them," *supra* at 15, is hotly disputed, as is the exact nature of Dailide's role in asking questions and recording information. It may be that the court's conclusion is exactly correct, but that can only be determined by a finder of fact. It should also be noted that Judge Nelson's concurrence does not express an opinion on this line of reasoning.

Therefore, I would hold that summary judgment was not appropriate on the "assisting in persecution" count, and would remand for trial.

IV

I turn now to the misrepresentation count. Section 10 of the Displaced Persons Act, upon which the government bases this claim, dictates that "any person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." 62 Stat. 1009, 1013 (1948). I have no doubt that Dailide made a misrepresentation, but the question is whether his misrepresentation was sufficient to violate Section 10.

The evidence supporting the government's case here is simple. First, there is the CIC questionnaire, signed by Dailide, that says he was a practitioner forester between 1942 and 1944, and that he was not a member of any organization, police force, or civil service. *See supra* at 5. The form was in

German and English, and the form indicates that Dailide spoke German and "a little" English at the time. Then there is a Displaced Persons Commission internal report that repeats the "forester" line in the chronology. Next is the following exchange in Dailide's deposition:

> Q Well, did you and any other Lithuanians [awaiting processing in Germany] discuss whether you should put down or not put down on the immigration forms that you had been a member of a police organization in Lithuania or a military organization?
>
> A There were, I guess, discussions, because I know at the beginning, Americans turned over to Russian Communists some people, you know, like from Ukrainians and this; and some people even, I remember, commit suicide, because they no want to go back to Russia. And it wasn't fair. All people were afraid very much. And since the Lithuania -- said this American government was in and maybe change this. If they get friendly with Russia they might turnover -
>
> Q Uh-huh.
>
> A So the advice by most, whatever, to say that you should not, I mean, tell those things, you know.

The final piece of evidence, tying all of this together, is an affidavit from Daniel Ashe. Ashe was a Case Analyst for the

Displaced Persons Commission. According to Ashe, based on the facts he had been told -- that Dailide was an armed officer in the *Saugumas* from 1941 to 1944 and that the Police were under Nazi control; that the *Saugumas* participated in the arrest and incarceration of Vilnius Jews; and that Dailide himself participated in arresting Jews trying to escape from the ghetto, and in inventorying the possessions of an arrested Jew -- if any one of these three things had been known and true, Dailide would not have been eligible for admission. Next, noting Dailide's misrepresentation, Ashe said that even if Dailide's service in the *Saugumas* would not have made him ineligible per se as a "member of a hostile movement" (another basis for refusing displaced-person status not relevant to this appeal), knowledge of that service would have led the DPC to investigate Dailide further. Ashe then noted a case in which a member of the Waffen SS was denied admission because, even though his unit was no longer considered a part of a hostile movement, he had misrepresented his service. Ashe's testimony establishes the materiality of Dailide's lie.

Dailide contests the district court's ruling with several alternative claims: that his misrepresentation was not made to a person charged with enforcement or administration of the Displaced Persons Act; that his misrepresentation was not willful; that his misrepresentation was not material; and that his misrepresentation was not made for the purpose of gaining admission into the United States. I would reverse as a matter of law on the first point, and thus need not address Dailide's other arguments in detail.

Dailide's argument that he did not misrepresent to anyone "charged with the enforcement or administration" of the Act rests on an implementing regulation of the Displaced Persons

Act, 8 C.F.R. § 700.11 (1950), which says that a disqualifying misrepresentation must be to a "person while he is charged with the enforcement or administration of any part of the act, of any matter, material to an alien's eligibility for any of the benefits of this act." Dailide notes that the questionnaire on which we conclude that he wilfully attested to false facts was given to the counter-intelligence corps, and that the CIC was not "charged with the enforcement or administration" of the Act.

In support of this proposition, Dailide cites roughly contemporaneous Bureau of Immigration Affairs (BIA) case law, and a 1951 letter from Attorney General McGrath to the Chairman of the BIA. Only two of the BIA cases are relevant. The first BIA case is *In re Suess et al.*, Nos. A-7927755-57 (Sept. 26, 1951), *approved by Att'y Gen.* (Oct. 16, 1951). In that case, an applicant, Suess, gave the Army false information regarding her whereabouts at certain points in the past. When applying for a visa, however, Suess voluntarily admitted her misrepresentations in her sworn visa application. The BIA found that even though the CIC was charged with performing investigations in pursuance of the Displaced Persons Act, it was not charged with the *enforcement* of the Act. Therefore, even though Suess's misrepresentation was material, it did not violate Section 10, because it was made only to the CIC.

The other case, decided the same day, is *In re Altman* et al., Nos. A-7991300-01 (Sept. 26, 1951), *approved by Att'y Gen.* (Oct. 16, 1951). The Altmans gave false information to the CIC about when exactly they entered Germany. That information was passed along to the DPC, along with a CIC analysis of the inconsistencies. The Altmans came before the

DPC and told the truth under oath. Had they persisted in lying when called before the committee, the BIA held, they would have been ineligible for admission into the United States. As it was, however, they did not so persist. Citing *Suess*, the BIA ruled the Altmans were eligible for admission.

The government first attempts to distinguish these BIA cases by saying that they involved the minor matter of residence, place and time, and not the more significant matter of police service. This distinction is not persuasive. The BIA held in the above cases that the misrepresentations were material. *Suess*, at 2; *Altman*, at 2. Dailide's misrepresentations were more weighty, to be sure, but there is no basis in the law to allow such a distinction to make a difference -- either a misrepresentation is material or it is not, and all of these misrepresentations (Dailide's and the ones in the BIA cases) were material.

The government argues next that it would be absurd to hold that Dailide did not make a misrepresentation to the DPC merely because the DPC did not interview Dailide personally, and despite the fact that the DPC relied upon the CIC's information (as it generally did). The government thus offers another basis to distinguish the BIA cases -- that since all of the defendants either recanted or were found not to have misrepresented anything, neither *Suess* nor *Altman* involved a misrepresentation that was relied upon by the DPC. By contrast, Dailide did not recant, and his lies were relied upon by the DPC.

This distinction does not distinguish, for reasons made clear in the McGrath letter. In the letter to the BIA, dated December 5, 1951, two months after Attorney General

McGrath approved the results in *Suess* and *Altman*, McGrath discusses the *Suess* and *Altman* cases, noting that they are binding precedent,[5] and saying that they should be limited to the following propositions: (1) misrepresentations about residence are material; and (2) such misrepresentations are not disqualifying when made to the CIC, since it is not an agency charged with the enforcement of the Act.

The purpose of the letter, though, was not to determine which types of misrepresentations should result in denial of admission. Rather, the letter was concerned with the best way to categorize a hypothetical applicant, who lied to the CIC and whose application was then rejected by the DPC. McGrath considered the following hypothetical situation presented by a submission from the BIA:

> An alien made a false statement or presented a false document to the CIC, but never directly to the Commission, Consul, or the [INS]. This false statement reached the Commission, Consul or the [INS] through its incorporation in the file which moves intact from agency to agency. The Commission rejected the case solely on the basis of the file, without having interviewed the applicant, and without any direct reaffirmation of the false statement by the alien to the Commission. This case has not been reactivated and the applicant has made

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[5] Although Dailide's actions preceded all of these cases, the government has given no basis to conclude that the new cases represented a shift in policy, or that Dailide's case would have been decided under different standards.

> full disclosure of the truth. Does the original rejection by the Commission, under Section 10, on the basis of the file alone, bar the applicant who has now made full disclosure?

BIA Memo at 4. The BIA's suggested answer is no. This was because "for a false statement to be a wilful [sic] misrepresentation under Section 10, it must have been made *directly* to the [DPC], the Consuls, or the [INS]." (Memo at 6, question 2, emphasis in original.) What matters for Section 10 purposes, then, is not the fact of the recantation, but rather the fact that the misrepresentation was made only to the CIC. This is so even when the DPC relies on the CIC document.

The BIA makes this point even more clearly when it states that a false statement to the CIC does not become a "misrepresentation . . . by adoption" to the DPC merely because the statement is present in the DPC's file, "where the alien has never persisted in the false statement before the [DPC]." Putting it another way, there is no misrepresentation for Section 10 purposes "unless [the alien] adopts or ratifies the false statement or false document by *reasseverating* the misrepresentation before the administrative or enforcement agency." (emphasis added). BIA memo, at 4.

Finally, at page 6 of the memo, the BIA answers the exact question at issue here, in answer to question 3 posed to it by the DPC. "Does . . . a false statement to the [CIC], which becomes part of the [DPC] file . . . become a misrepresentation to the [DPC] . . . where the alien has never persisted in the false statement before the [DPC], the consuls or the [INS]." The answer is an unequivocal "No."

Attorney General McGrath did not concur in all of the language in the BIA's position. He noted that he might have arrived at a different conclusion in the *Seuss* and *Altman* cases, though he did not indicate what that different conclusion would have been. However, he went on to state, quite specifically, that:

> Such misrepresentation [a material one as to residence] to the Counter Intelligence Corps of the United States Army . . . is not a misrepresentation within the contemplation of Section 10, since the Counter Intelligence Corps is not an agency charged with the enforcement or administration of the Displaced Persons Act.

This ruling of law could hardly be clearer that the bare fact of a false statement to the CIC does not violate Section 10.

Alternatively, did Dailide "reassert" or "persist in" his statement? The government offers only sparse evidence for such a conclusion. First, a DPC report repeats the false chronology from the CIC report. But this internal report does not contain any attestation or reaffirmation by Dailide, or even any indication that Dailide knew of the report. Next, the government states that "Dailide swore to the truth of the information on his visa application and was interviewed by a State Department Vice Consul. Once again, Dailide did not reveal his service in the *Saugumas*." (Appellee's Brief at 12). A review of the visa application plainly shows that it contains no questions or information relating to police service. There is no place on the application where Dailide's earlier efforts to conceal his police service could be renounced. Nor do the

documents incorporated by reference into the application have anything to do with police service. A review of the part of the district-court record cited by the government regarding the Vice Consul interview reveals only Dailide's testimony that the matter of his police service never arose in the interview, and not that he actively concealed it. The government offers no evidence to the contrary. *Cf. United States v. Hajda*, 963 F. Supp. 1452, 1467 (N.D. Ill. 1997) (not reaching the merits, and noting that Vice Consuls would typically ask applicants "about their wartime activities and whether they worked with or for the Germans during the war"); *United States v. Palciauskas*, 559 F. Supp. 1294, 1298-99 (M.D. Fla. 1983) (alien affirmed false statements in interview with Vice Consul). Therefore, the government has certainly not proven as an undisputed fact that Dailide reaffirmed his misrepresentation.

There is another flaw in the government's case, one that underscores the reasons for rejecting the government's "adoption" theory. It is that the only evidence in the record regarding Dailide's motivation for lying on the CIC form suggests that his reason for misrepresenting his *Saugumas* service was to avoid being sent to his death in the Soviet Union, and was not specifically "for the purpose of gaining admission into the United States," as required by Section 10. *See generally* Julius Epstein, Operation Keelhaul (1973) (detailing forced repatriation to Soviet Union, and subsequent murder of, large numbers of prisoners and refugees). Although a statement by Dailide later in the visa application process (*i.e.*, to the DPC or the Vice Consul) would be more easily characterized as fulfilling this requirement, his early statement to the CIC is less easily categorized as such. In particular, the court overstates, *supra* at 20, by saying that the

CIC form was completed "when applying for his DPA visa." The CIC form is dated December 13, 1949. The DPA visa application is dated January 23, 1950 (tab 117, Exh. 5, 7). It *may* be true that Dailide knew and intended that the CIC answers would go to the DPC and help him gain admission to America. But that has not been shown as an undisputed fact. *Federenko*, properly relied on by the court, *supra* at 21, involved a person who was found, after trial, to have lied on the DPA application itself. *See Federenko*, 449 U.S. at 498, 507 n.26. If that were the case here, motivation and knowledge would not be issues that are relevant, if at all, after findings at trial. But since Dailide did not lie on the DPA application, we cannot attribute a damning motive to his earlier actions.

Finally, the government notes that the DPC interviewed few applicants directly, which it suggests should lead us to place more weight on the DPC's adoption of the CIC report. The "adoption" theory did not, after all, explicitly apply to cases such as this one where there was no contemporaneous recantation. However, the DPC's reliance on the CIC, as well as its practice of not interviewing many applicants directly, was specifically noted by McGrath, and did not sway his conclusion. Furthermore, the cases that the government cites in support of its "adoption" theory are distinguishable. In two cases, the DPC relied not just on CIC materials but on a fraudulent DPC *Fragebogen* (questionnaire) filled out by the applicant as well, so that there was a misrepresentation made directly to the DPC. *See United States v.* Kowalchuk, 773 F.2d 488, 492 (3d Cir. 1985); *Leprich*, 666 F. Supp. at 971. In two other cases, the government was held to have provided adequate proof of reaffirmation before the Vice Consul (an official who is "charged with enforcement of the act"). *See*

Hajda, 963 F. Supp. at 1467; *Palciauskas*, 559 F. Supp. at 1298-99. This leaves only one case cited by the government that parallels this one. *See United States v. Osidach*, 513 F. Supp. 51, 101-02 (E.D. Pa. 1981) (DPC relied on IRO document, which the district court held to suffice). However, *Osidach* did not discuss the issues raised by the BIA cases and the McGrath letter. More importantly, in *Osidach* the government's summary judgment motion was denied, and a full trial was held. 513 F. Supp. at 58, 107 n.34. The district court made a specific finding of fact that Osidach *knew* that his false IRO form would be submitted to the DPC and relied on, and *thus* there was a "misrepresentation of a material fact before the DPC . . . ." *Id.* at 102. That factual finding is exactly what we cannot supply on summary judgment by an inferential leap. Taking the evidence in the light most favorable to Dailide, he made a misrepresentation to an agency *not* "charged with enforcement or administration" of the DPA. Osidach had a trial to find that the facts were otherwise. Dailide has not.

I would therefore reverse the district court as to the misrepresentation count, as well.

V

It should be unnecessary to add that this opinion does not represent the views of an "apologist[] for Dailide"; "a travesty"; "no greater insult to the spirit and purpose" of America; or any of the other phrases flung about in the court's opinion. The issue is not whether Dailide is a nice man, or whether Nazis are evil. The sole issue before us now is whether a trial is necessary.

I emphasize that my opinion would only reverse the grant of summary judgment. Denaturalization proceedings could continue, and a full trial could produce the same result. However, in stripping an American citizen of that citizenship, the law is unmistakable that the government must turn square corners and prove its case by "clear, unequivocal, and convincing" evidence. Particularly in this case, where the degree of connection to persecution and the exact nature and timing of misrepresentations are crucial, disputed issues of fact should be resolved at trial, not by assumptions based on guilt by association, however well founded. I therefore respectfully **DISSENT**.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

CASE NO. 1:94CV2499

[Filed January 29, 1997]

UNITED STATES OF AMERICA,)
Plaintiff)
)
-vs-)
)
ALGIMANTAS DAILIDE,)
Defendant)

JUDGES:
Paul R. Matia, UNITED STATES DISTRICT JUDGE

MEMORANDUM OF OPINION AND ORDER

This case is before the Court pursuant to the government's motion for partial summary judgment (Doc. 51).[1] On

[1] Although the motion is entitled "Motion of the United States for Summary Judgment," it embraces only two of the six counts contained in the complaint. It is therefore properly a motion for partial summary judgment.

December 7, 1994, the plaintiff filed a six-count complaint seeking to revoke the citizenship of and cancel the Certificate of Naturalization issued to the defendant, Algimantis Dailide. The plaintiff seeks summary judgment on Count I, which contends that Dailide was guilty of the persecution of a civilian population in violation of section 2(b) of the Displaced Persons Act of 1948 ("DPA"), and on Count IV, claiming that the defendant made material misrepresentations during the immigration process which rendered him ineligible for admission to the United States under section 10 of the DPA. Having considered the memoranda submitted by the parties on these issues (Docs. 51-57, 65, 66, 72, 75, 88, 90, 95),[2] as well as the oral arguments presented by counsel at the

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[2] On December 30, 1996, in order to alleviate the burden of trial preparation, the Court notified counsel by facsimile transmission of its intention to grant the government's motion for partial summary judgment. Nonetheless, on January 2, 1997, the defendant filed an eighty-one (81) page trial brief, with seventeen (17) attached exhibits (Doc. 102). A trial brief is intended to summarize the arguments of the parties and assist the Court in preparing for trial. It is not a forum for the introduction of new evidence, and no issue concerning the propriety of admitting any such new evidence is therefore raised. Because it is separate and distinct from and irrelevant to the summary judgment motion practice in this case, the defendant's trial brief has not been considered by the Court in formulating the instant opinion. For similar reasons, the Court in ruling on the instant motion has also declined to consider other documents filed by the defendant subsequent to the December 30 notification (Docs. 103, 104). Despite the fact that these documents are not relevant to the Court's consideration of the instant motion, the "Government's Motion to Strike Defendant's pleadings as Moot" (Doc. 107) has been denied.

December 20, 1996, hearing on the instant motion, the Court now GRANTS the government's motion for the following reasons.

I. BACKGROUND

A. Factual Background

The defendant, Algimantas Dailide, was born on March 12, 1921, in Kaunas, Lithuania. After Germany invaded Lithuania on June 22, 1941, the Nazis reestablished a police force in that country known as the *Saugumas*. That organization existed during the Soviet occupation of Lithuania, but had been disbanded prior to the German invasion. The defendant voluntarily joined the *Saugumas* in 1941 and served until 1944, when the force dissolved along with the Nazi regime.

After living in Germany until 1949, Dailide applied for emigration to the United States and eventually entered this country in 1950 as a non-quota immigrant. On February 3, 1955, the defendant applied for naturalization, and on September 6 of that year this Court granted the defendant's application. The defendant now resides in Brecksville, Ohio.

B. Legal Standard for Denaturalization

Although denaturalization is a civil proceeding, the United States must demonstrate "by clear, unequivocal and convincing evidence" that citizenship should be revoked. *Fedorenko v. United States*, 449 U.S. 490, 505, 66 L. Ed. 2d 686, 101 S. Ct. 737 (1981). "Any less exacting standard

would be inconsistent with the importance of the right that is at stake in a denaturalization proceeding." *Id.* at 505-06. However, "there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship." *Id.* at 506.

Section 316 of the Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. § 1427(a), requires that a naturalized citizen must have been "lawfully admitted" into this country. Section 340 of that Act, 8 U.S.C. § 1451(a), authorizes the government to bring suit

> in any district court of the United States in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate were illegally procured or were procured by concealment of a material fact or by willful misrepresentation . . . .

C. Legal Standard for Summary Judgment

Federal Rule of Civil Procedure 56) governs summary judgment motions and directs the Court to grant summary judgment

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

> there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law.

A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Determination of whether it is "genuine" requires consideration of the applicable evidentiary standard. *Id.* at 252. The Court must decide whether a reasonable trier of fact could find that the non-moving party is entitled to a verdict. In reviewing the motion for summary judgment, a Court must view the evidence in the light most favorable to the non-moving party when deciding whether a genuine issue of material fact exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970); *White v. Turfway Park Racing Assn., Inc.*, 909 F.2d 941, 943-44 (6th Cir. 1990).

"To withstand a motion for summary judgment the opposing party 'may not rest upon the mere allegations or denials' in its pleadings, but must respond 'by affidavits or as otherwise provided . . . [setting] forth specific facts showing that there is a genuine issue for trial.' Fed R. Civ. P. 56(e). Mere conclusory allegations are insufficient to withstand a motion for summary judgment." *Cincinnati Bell Telephone Co. v. Allnet Communication Services, Inc.*, 17 F.3d 921, 923 (6th Cir. 1994), *citing, Mcdonald v. Union Camp Corp.*, 898 F.2d 1155, 1162 (6th Cir. 1990).

D. Summary Judgment in Denaturalization Cases

Notwithstanding the *Fedorenko* Court's recognition of "the importance of the right that is at stake in a denaturalization proceeding," 449 U.S. at 505-06, ample precedent exists for the revocation of citizenship at the summary judgment stage. *See, e.g., United States v. Lileikis*, 929 F. Supp. 31 (D. Mass. 1996); *United States v. Koreh*, 59 F.3d 431 (3d Cir. 1995); *United States v. Leprich*, 666 F. Supp. 967 (E.D. Mich. 1987).

II. COUNT I (PERSECUTION OF CIVILIAN POPULATIONS)

A. Statutory Background

In order to qualify as an "eligible displaced person" (for purposes of emigration to the United States) under section 2(c) of the DPA, an applicant must be, among other things, "a displaced person as defined in subsection (b) above . . . ." Subsection (b) includes "any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization and who is the concern of the International Refugee Organization."

The Constitution of the International Refugee Organization ("IRO"), in turn, sets forth a number of groups that are by definition not "of concern" to that body. These include, at Part II, section 2, "any other persons who can be shown: (a) to have assisted the enemy in persecuting civilian populations of countries . . . ."

Since the defendant entered this country pursuant to the DPA, the continuing validity of his citizenship and naturalized status must be judged by reference to the standards set forth at Part II, Section 2(a), of the IRO constitution. If he is found not to be the concern of the IRO by its terms, then he is not (and never was) an "eligible displaced person" who was "lawfully admitted" to this country, and his citizenship must be revoked under 8 U.S.C. § 1451(a) because it was "illegally procured."

B. Persecution of Civilian Populations

The government advances two alternate theories in support of summary judgment on Count I of its complaint: The first asserts that by reason of the defendant's membership in the *Saugumas* and the documented role in the persecution of the Jewish people played by that organization, Dailide is "guilty by association" of persecution. The second contends that independent of the fact of membership in the *Saugumas*, the defendant himself committed documented acts amounting to persecution that independently disqualify him according to the terms of the IRO Constitution. The Court will address each argument separately.

1. Role of the *Saugumas*

The Supreme Court's decision in *Fedorenko* explained that persecution under section 2(b) may under certain circumstances be demonstrated without a showing of individual participation in persecution. Although *Fedorenko* and many of its progeny deal with armed concentration camp guards, it seems clear that the Supreme Court did not intend

to limit the above rule only to camp guards. Instead, the Court indicates that the assistance question must be answered according to the facts of each case, while making clear that individual participation is not a necessary prerequisite to liability. *Fedorenko*, 449 U.S. at 512 n. 34. *See Koreh*, 59 F.3d at 439 ("We have read Fedorenko as describing a 'continuum of conduct to guide the courts in deciding' how to apply the term 'assistance in persecution.' *Breyer*, 41 F.3d 884, 890. Thus, the term is to be applied on a case-by-case basis with reference to the relevant facts presented in each case.")

At least two cases decided after *Fedorenko* support this conclusion. In 1981, the Eastern District of Pennsylvania held that a Ukrainian policeman, against whom no specific acts of violence had been proven, nonetheless assisted in the persecution of civilians.

> Osidach's personal assignment as an armed, uniformed Ukrainian street policeman constitutes on the present record the form of mental persecution that quite naturally follows from the conspicuous public display of armed force and uniformed authority, regularly, over a long period of time in a repressive ghetto-type atmosphere. The mere presence of the watchful eye of the conqueror or his deputies, coupled with the often demonstrated presence of both the means and the inclination to persistently inflict various indignities, physical abuse, injuries or even death, without notice or reason, is the personification of mental

> persecution, to anyone, let alone innocent civilian men, women and children reduced to various degrees of substandard mental and physical well-being.

United States v. Osidach, 513 F. Supp. 51, 99 (E.D. Pa. 1981).[3]

More recently, in revoking the citizenship of the chief of the *Saugumas*, the Eastern District of Massachusetts relied on testimony concerning the role of that group involving matters in which that defendant did not personally participate. *Lileikis*, 929 F. Supp. at 34-35.

This Court believes that the underlying rationale of those decisions and their reliance on *Fedorenko* is reasonable and appropriate, and turns now to consider the evidence at bar concerning the activities of the *Saugumas*.[4]

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[3] Although this issue was considered by the *Osidach* court and others under section 13 of the DPA, this Court does not believe that the distinction is material because the standard for persecution of civilian populations is identical under both sections. *See Koreh*, 59 F.3d at 437 (noting that proof of "advocacy and assistance in persecution" would render the defendant "ineligible for a DPA visa under *both* section 2(b) and section 13 of the DPA.") (Emphasis added.)

[4] The government's evidence on this point has been supplied by its expert historian, Dr. Yitzhak Arad. Dr. Arad's role in this case has been disputed vigorously by the defendant, both directly in the form of a motion in limine seeking to bar his

Utilization of local police forces like the *Saugumas* was a standard practice intended to assist the Germans in maintaining control of the local populations of conquered nations. Their responsibilities included the enforcement of anti-Jewish laws such as curfews and confinement to ghettos, prohibitions against the use of public facilities and transportation, and requirements that Jews display visibly a yellow Star of David. In addition to these general duties, the government has submitted documentary evidence exemplifying some of the more specific atrocities committed by members of the *Saugumas*.

In one instance, Gitta Kaplan and her six year old daughter Fruma, both Jewish, were arrested outside Vilnius for the offense (as described by their prison information sheets) of "escape from the ghetto." Shortly after imprisonment, both were executed at Paneriai, a forest area outside of Vilnius. In a second instance, Saulius Varsavskis and Jenta Rachmaniene, two young Jews arrested by the *Saugumas* for escaping from a ghetto, were imprisoned and later executed. In yet a third, Dovydas Palenbaumas, a Jew, was arrested by the *Saugumas*, held, and later shot. Dr. Arad has testified that hundreds of Jews were arrested or turned

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testimony, and indirectly in a second motion relating to the deposition of Office of Special Investigations ("OSI") historian Michael McQueen. Both motions were denied as moot (Doc. 108), indicating the Court's belief that Dr. Arad's testimony is competent. *See also Lileikis, 929 F. Supp. at 38* (noting the absence of "a single Holocaust scholar or American court that has questioned Dr. Arad's work" concerning the role of the *Saugumas* during the Holocaust.)

over to the *Saugumas* during the summer and fall of 1941, and most were eventually shot at Paneriai.

Furthermore, the *Saugumas* was headquartered near the route on which Jewish captives were transported to Paneriai from the Lukiskes prison in which many were held. Not only does this proximity make it highly improbable that any *Saugumas* member could have been unaware of the ultimate fate of those they arrested, but the defendant himself testified that he "heard talk that (Jews) were killed in Paneriai."[5]

2. Specific Acts of Dailide

Beyond the documented atrocities committed by the organization to which Dailide belonged, which as discussed earlier would be sufficient by themselves to grant judgment for the plaintiff on Count I, the government has introduced evidence of activities by the defendant himself which provide an alternate and independent basis for this Court's holding that Dailide assisted in the persecution of civilian populations. The defendant has admitted that incident to his membership in the *Saugumas*, he sometimes searched, arrested, and questioned people.

More importantly, the government has provided evidence of two specific instances of persecution in which Dailide himself participated. One is supported by three authenticated documents. The first document is a report addressed to

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[5] For additional discussion and examples of the role of the *Saugumas*, *see Lileikis*, 929 F. Supp. at 34-35.

Aleksandras Lileikis, chief of the Vilnius *Saugumas*, detailing an arrest of several "individuals of Jewish Nationality who were escaping from Vilnius," and indicating explicitly that the defendant had participated in the arrest. The second document, also a report sent to *Lileikis*, relates specifically to two of the Jews arrested (Izrael and Riva Soak), and again details the individual participation of Dailide. The final document describes the fate of the fifty-two individuals arrested, indicating that they were to be shot and killed at Paneriai.

An arrest report signed by the defendant detailing his search of a Jewish prisoner constitutes a second instance of persecution. The report indicates that the money Dailide discovered in his search was turned over to the *Saugumas*.

Accordingly, the Court finds that the defendant assisted in the persecution of civilian populations within the meaning of the IRO constitution, and was therefore ineligible for immigration to this country under section 2 of the DPA.

III. COUNT IV (MATERIAL MISREPRESENTATIONS)

A. Statutory Background

The statutory scheme controlling this count is somewhat more straightforward. Section 10 of the DPA provides that "any person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." 8 U.S.C. § 1451(a) explains that in

order to justify revocation of citizenship, a misrepresentation must relate to a material fact. *Kungys v. United States*, 485 U.S. 759, 774-75, 99 L. Ed. 2d 839, 108 S. Ct. 1537 (1988). This Court must therefore determine first whether the defendant made misrepresentations for the purpose of gaining admission into this country, second whether they were made willfully, and third whether they were material to his admission. If the answer to each of these inquiries is affirmative, the government is entitled to judgment as to Count IV of its complaint as well.

B. Willfulness and Materiality

Notwithstanding the defendant's argument that the question of willfulness is inappropriate for resolution on summary judgment because it is intertwined with the issue of motive, "a specific intent to deceive . . . is not required to show that these misrepresentations were willful." *See Hernandez-Robledo v. INS*, 777 F.2d 536, 539 (9th Cir.1985). *See also Bufalino v. INS*, 473 F.2d 728, 738 (3d Cir.) (Adams, J., concurring), *cert. denied*, 412 U.S. 928, 93 S. Ct. 2751, 37 L. Ed. 2d 155 (1973). ("Administrative authorities have long interpreted 'willful' to mean 'intentional.'") Although this Court is not aware of a case that has specifically addressed the meaning of "willfulness" under the DPA, no reason is apparent to depart from the interpretations of the foregoing authorities.

Clear guidance does exist in defining the term "material." The Supreme Court has explained that a misrepresentation is material for purposes of a denaturalization proceeding if "the misrepresentation or concealment was predictably capable of

affecting, *i.e.*, had a natural tendency to affect, the official decision." *Kungys*, 485 U.S. at 771.

C. The Defendant's Misrepresentations

The government identifies two misrepresentations made by the defendant in connection with the immigration process. It contends that both were willful and material, and are therefore grounds for the revocation of the defendant's citizenship pursuant to 8 U.S.C. § 1451(a). The Court agrees.

When applying for an immigration visa, the defendant was required to complete and sign a personal history form prepared by the United States Army's Counter Intelligence Corps ("CIC"). The following information appeared on the form completed by the defendant:

> Q: Exact description of your activities and residences during the last few years.
>
> A: . . . 1942-1944 practitioner forester in Vilnius/Lithuania . . . .
>
> Q: All other organizations to which I have belonged - Police service
>
> A: No

The signature on the CIC form, nor contends that he failed to understand what he was signing. It is clear, however, that both of the above responses are false, because the defendant

has admitted by affidavit that he served in the *Saugumas* during the years in question.

The defendant contends, however, that the misrepresentations were neither willful nor material, and thus do not merit denaturalization. However, as discussed above, willfulness is an objective standard. It is irrelevant whether, as the defendant suggests, he concealed his police service due to a fear of repatriation to the Soviet Union and the ensuing and potentially unpleasant consequences. *Fedorenko*, 449 U.S. at 507 n. 26. The undisputed fact that he did so knowingly and intentionally makes the misrepresentations willful.

Dailide also argues that the two misrepresentations discussed above were not material to his immigration proceedings. According to the standard set forth by the Supreme Court in *Kungys,* however, this argument must fail. The documents containing the misrepresentations were reviewed at the critical stage of the immigration process by the DPC. During discovery in this case, the deposition of anticipated defense witness Jerome Brentar was conducted. Mr. Brentar, a former IRO eligibility officer, testified that if an individual with Dailide's background had accurately represented his wartime activities, his application would have been referred to a review board in Geneva for further consideration.[6]

[6] This is in contrast to the disposition of Dailide's fraudulent application, which of course was approved.

The plaintiff offers the affidavit of Michael Thomas who, in 1948, became the Chief Eligibility Officer of the IRO. Mr. Thomas also co-authored *The Manual for Eligibility Officers*, an application guide for organizational procedures. In short, a case referred to the review board would have been under the jurisdiction of Mr. Thomas and his staff. After considering the defendant's circumstances in this case, Mr. Thomas averred that had Dailide not misrepresented his background, he would have been ineligible for IRO relief and therefore unable to obtain an immigration visa admitting him to this country.

For the foregoing reasons, the Court finds that the defendant violated section 10 of the DPA by willfully and materially misrepresenting his background for the purpose of gaining admission into the United States.

IV. HOLDING

As a consequence of this Court's findings, it is clear that Dailide was not "lawfully admitted" into the United States for purposes of naturalization under 8 U.S.C. § 1427(a), and that his citizenship and certificate of naturalization were "illegally procured or were procured by concealment of a material fact or by willful misrepresentation" within the meaning of 8 U.S.C. § 1451(a). The plaintiff's motion for summary judgment as to Counts I and IV of the complaint (Doc. 51) is therefore GRANTED.

IT IS SO ORDERED.

/s/ _____
Paul R. Matia
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 01-3820

[Filed April 17, 2003]

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
)
v.)
)
ALGIMANTAS DAILIDE,)
Defendant-Appellant.)

JUDGES: Before BOGGS, SUHRHEINRICH, and CLAY, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully

considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ _____
Leonard Green, Clerk

APPENDIX F

STATUTORY AND CONSTITUTIONAL PROVISIONS

The following statutory and constitutional provisions are reproduced as of the date the citizenship order was entered, September 6, 1955.

§ 1427. Requirements of naturalization—Residence

(a) No person, except as otherwise provided in this title, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years . . .

§ 1429. Prerequisite to naturalization; burden of proof

Except as otherwise provided in this title, no person shall be naturalized unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of this Act.

§ 1449. – Certificate of naturalization; contents

A person admitted to citizenship by a naturalization court . . . shall be entitled upon such admission to receive from the clerk of such court a certificate of naturalization, which shall contain substantially the following information: . . . statement that the court, having found that the petitioner . . . had

> complied in all respects with all of the applicable provisions of the naturalization laws of the United States, and . . . thereupon ordered that the petitioner be admitted as a citizen . . .

Jurisdiction to revoke the order of citizenship is reproduced as of the date of filing the Complaint:

§ 1451. Revocation of naturalization

> **(a) Concealment of material evidence; refusal to testify.** It shall be the duty of the United States attorney for the respective districts upon affidavit showing good cause therefore, to institute proceedings in any district court of the United States in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively . . .

The United States Constitution states:

Article I, Section 8, Cl. 4

Congress shall have the power . . . to establish a uniform Rule of Naturalization . . .

APPENDIX G

Fold-Out Exhibit

Certificate of Naturalization

THE UNITED STATES OF AMERICA

DUPLICATE
TO BE FORWARDED TO
IMMIGRATION AND NATURALIZATION SERVICE

No. 7523761

Petition No. 122236

Personal description of holder as of date of naturalization: Date of birth March 12, 1921; sex male; complexion fair; color of eyes blue; color of hair brown; height 5 feet 11 inches; weight 168 pounds; visible distinctive marks scar on skin over left cheek bone near the nose; Marital status married; former nationality Lithuania.

I certify that the description above given is true, and that the photograph affixed hereto is a likeness of me.

sign here

Algimantas Mykolas Dailide
(Complete and true signature of holder)

Algimantas Mykolas Dailide

UNITED STATES OF AMERICA
NORTHERN DISTRICT OF OHIO } ss:

Be it known, that at a term of the District Court of The United States held pursuant to law at Cleveland, Ohio on September 6th, 1955 the Court having found that Algimantas Mykolas Dailide whose residing at 1371 Russell Road, Cleveland, Ohio intends to reside permanently in the United States (where so required by the Naturalization laws of the United States), had in all other respects complied with the applicable provisions of such naturalization laws, and was entitled to be admitted to citizenship, thereupon ordered that such person be and she was admitted as a citizen of the United States of America.

In testimony whereof the seal of the court is hereunto affixed this 6th day of September in the year of our Lord nineteen hundred and fifty-five and of our Independence the one hundred and eighty.

C. B. Watkins
Clerk of the U. S. District Court.

By _____ Deputy Clerk.

2

It is a violation of the U. S. Code (and punishable as such) to copy, print, photograph, or otherwise illegally use this certificate.

DEPARTMENT OF JUSTICE

BEST AVAILABLE COPY